Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1537

VOLKSWAGENWERK ARTIENGESELLSCHAFT and VOLKSWAGEN OF AMERICA, INC.,
Petitioners

v.

THE HONORABLE R. DIXON HERMAN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, SELDON P. TODD, JR., CAMERON AUTO, INC. and VOLKSWAGEN ATLANTIC, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1978

No.

VOLKSWAGENWERK ARTIENGESELLSCHAFT and
VOLKSWAGEN OF AMERICA, INC.,
Petitioners

v.

THE HONORABLE R. DIXON HERMAN, JUDGE
OF THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA,
SELDON P. TODD, JR., CAMERON AUTO, INC.
and VOLKSWAGEN ATLANTIC, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO: The Honorable the Chief Justice and
the Associate Justices of the Supreme
Court of the United States

Petitioners, Volkswagenwerk Aktiengesellschaft and Volkswagen of America, Inc., petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

None of the memoranda or orders in these actions were reported. The order of the United States Court of Appeals for the Third Circuit, denying petitioners' application for a writ of mandamus, contains no opinion and is printed in the appendix to this petition. Similarly, the memoranda and orders of respondent, Judge R. Dixon Herman, dated January 3, 1978 (denying petitioners' motion to certify the interlocutory order of August 15, 1977 under 28 U.S.C. §1292(b) and Rule 54(b) of the Federal Rules of Civil Procedure); August 15, 1977 (denying petitioners' motion for reconsideration of the court's order of January 10, 1977); and January 10, 1977 (denying petitioners' motions for summary judgment and retransferring the case to the District of Columbia) are contained in the appendix.

JURISDICTION

This Court has subject matter jurisdiction to review the Third Circuit's order of January 27, 1978 (see appendix) denying petitioners' application for a writ of mandamus.

QUESTIONS PRESENTED

I. WHETHER CONSIDERATIONS OF FUNDAMENTAL FAIRNESS DEMAND THAT A DISTRICT COURT APPLY THE SAME LEGAL PRECEPTS TO ALL DEFENDANTS WITHIN THE SAME CLASS WHEN THE PLAINTIFF INSTIGATES A CHANGE OF VENUE?

II. WHETHER IN TRANSFERRING THE CASE *SUA SPONTE* AND WITHOUT FIRST AFFORDING THE PROCEDURAL SAFEGUARDS OF NOTICE AND AN OPPORTUNITY TO BE HEARD, THE DISTRICT COURT OFFENDED PETITIONERS' RIGHT TO DUE PROCESS UNDER LAW?

STATUTE INVOLVED

This case involved 28 U.S.C. §1404(a), which provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

On January 10, 1977, United States District Judge R. Dixon Herman of the Middle District of Pennsylvania entered an order (1) denying petitioners' motions for summary judgment and (2) retransferring the case to the District Court for the District of Columbia. Originally, the *plaintiff* had filed suit in the District Court for the District of Columbia, but encountering various procedural difficulties he *voluntarily* and successfully instigated and secured a transfer to the Middle District of Pennsylvania, premised upon 28 U.S.C. §1404(a). As a result of Judge Hennan's order, petitioners applied to the United States Court of Appeals for the Third Circuit for a writ of mandamus, asserting that, in (1) refusing to apply Pennsylvania's two-year statute of limitations for personal injuries — the law of the transferee forum — when the plaintiff *voluntarily* had the case *transferred* from Washington, D.C. to Pennsylvania, and (2) retransferring the action to the District of Columbia without notice or an opportunity to be heard, the district judge had exceeded his authority. The court of appeals denied that petition, and as a result, petitioners have applied for certiorari.

This controversy arises out of an automobile accident of January 24, 1973, which occurred on Fifteenth Street, N.W., in Washington, D.C. Seldon P. Todd, Jr., the original plaintiff, while proceeding northward on the one-way, six-

lane highway, attempted to make a left turn across traffic from the right lane. At that point, a car owned and operated by Calvin J. Verrett struck his automobile on the left door causing damage to the car and injuries to Todd. As a result of the accident, Todd instituted a diversity action[1] on July 31, 1975 — two and one-half years after the accident — against four named defendants[2] in the District Court for the District of Columbia.[3] He attempted to obtain personal jurisdiction over Volkswagen Atlantic through Washington's "long-arm" statute, D.C. Code §§13-423(a) and 13-431(a)(3). However, Volkswagen Atlantic moved to quash the service as improper and to dismiss the case for lack of personal jurisdiction. On September 25, 1975, that district court granted those motions. Thereafter, *plaintiff* moved, pursuant to 28 U.S.C. §1404(a), *voluntarily to transfer* the action from the District of Columbia to the federal District Court for the Middle District of Pennsylvania, and on September 26, 1975, he was successful: Judge Pratt transferred the case. Once in the Middle District of Pennsylvania, Todd attempted again to gain valid service over Volkswagen Atlantic and apparently was successful. But once again, that defendant took action to have the case dismissed.

Looking to the district court complaint: it was alleged that the plaintiff had purchased the car, which is the subject

[1]Jurisdiction in the United States District Court was predicated upon diversity of citizenship and an amount in controversy exceeding $10,000.00. 28 U.S.C. §1332.

[2]Volkswagen Aktiengesellschaft, a West German corporation with its principal place of business in West Germany; Volkswagen of America, Inc., a New Jersey corporation with its principal place of business in New Jersey; Volkswagen Atlantic, Inc., a Delaware corporation with its principal place of business in Pennsylvania; and Cameron Auto, Inc., a Pennsylvania corporation with its principal place of business in Pennsylvania.

[3]The original action in the United States District Court for the District of Columbia was docketed at Civil Action No. 75-1255.

matter of this litigation, from Cameron Auto on May 23, 1968; and that the accident occurred on January 24, 1973.[4] Because the suit was not commenced until July 31, 1975 — more than two and one-half years after the accident — all of the defendants moved for summary judgment, invoking the Pennsylvania two-year statute of limitations regarding personal injury actions, 12 P.S. §34,[5] and four-year statute of limitations relating to actions for breach of warranty, 12A P.S. §2-725. On January 10, 1977, after all parties had submitted briefs, but *without benefit of oral argument* (though petitioners had requested it) or opportunity for rebuttal, Judge Herman granted Volkswagen Atlantic's motion for summary judgment on the ground that "the two-year Pennsylvania statute of limitations barred the action against Volkswagen Atlantic ..." and denied those of the remaining defendants because "the action had been begun and service made within the three-year limitations of the District of Columbia". At the same time, "[c]oncluding that the interests of justice would be best served if plaintiff were permitted to pursue his claims against [the remaining defendants] in the forum he had initially selected", the court "retransferred" the case to Washington — furnishing the remaining defendants neither notice nor an opportunity to be heard on that issue.

Subsequently, the petitioners moved for reconsideration of that decision on two bases:

1. The simultaneous granting of Volkswagen Atlantic's motion and the denial of the remaining

[4]After the case was transferred to the Middle District of Pennsylvania, all parties engaged in extensive discovery on the issues of liability and damages.

[5]Pennsylvania would apply its own two-year statute of limitations [12 P.S. §34], rather than the three-year District of Columbia statute irrespective of the substantive law or situs of the accident. *Jones v. Rabinowitz*, 296 F. Supp. 123 (E.D. Pa. 1969).

defendants' motions distinguish between defendants in the same class thereby denying the remaining defendants equal protection; and

2. The retransfer of the case without a formal motion, notice or hearing constituted a denial of due process under the Fifth and Fourteenth Amendments of the Constitution.

In its memorandum of August 15, 1977, the district court refused to reconsider these matters, stating that it lost jurisdiction once it had forwarded the case file to the District of Columbia court.[6]

Thereafter, Volkswagenwerk Aktiengesellschaft (VWAG) and Volkswagen of America, Inc. (VWoA) timely filed motions for certification of questions of law under 28 U.S.C. §1292(b) and to amend the January 10, 1977, order to comply with Rule 54(b) of the Federal Rules of Civil Procedure. On January 3, 1978, the district judge, without opinion, denied these motions.

On January 18, 1978, petitioners sought a writ of mandamus from the United States Court of Appeals,[7] and on January 27, 1978 — without opinion and citing no reasons — that court (per Gibbons, J.) denied the petition. In response to this denial, VWAG and VWoA have petitioned this court for certiorari.

REASONS FOR ALLOWING THE WRIT

I. This case involves an important question concerning the application of federal law which was expressly left

[6]Despite this statement, the docket entries indicated that the District Court for the Middle District of Pennsylvania had had possession of the case at the time it made its August 15, 1977 decision.

[7]Jurisdiction of the Court of Appeals was based upon 28 U.S.C. §1651, investing that court with subject matter jurisdiction over writs of mandamus. See *Swindell-Dressler Corp. v. Dumbauld*, 308 F.2d 267 (3rd Cir. 1962)

open for future determination in *Van Dusen v. Barrack*, 376 U.S. 612 (1964). This important question is ripe for decision.

II. The decision of the District Court below conflicts with the decisions which other federal courts in other circuits have decided. *See, Carson v. U-Haul*, 434 F.2d 916 (6th Cir. 1970); *Brown v. Merrow Machine Co.*, 411 F. Supp. 1161 (D. Conn. 1976). As a result, to avoid a further widening of the split among the circuits, this Court should resolve the question of federal procedure which directly affects substantive law applied in the case.

III. Unless this Court grants this petition and affords review, the error below will escape all review and will be unremedied. As a result, the petitioners will be put to the undue expense, inconvenience and harassment of litigating a barred action in a forum which was ultimately chosen by none of the litigants.

IV. Petitioners' constitutional rights of due process and equal protection have been severely impaired by the District Court's failure to apply the same legal precept to defendants of identical situation. Accordingly, petitioners' sole remedy lies with this court.

V. *Sua sponte* retransfer of the suit against only part of the litigants, without a motion or opportunity to be heard, contravenes due process and is remediable only at this stage of the proceedings. The District Court's initial order transferring the case was in excess of the judge's authority; the judge refused to correct this error on reconsideration by ratifying his earlier decision; and, if this court fails to take the case for review, the initial erroneous act will go unremedied.

VI. The decision of the District Court encourages forum shopping on stale, time-barred claims at a time when the federal diversity dockets are overcrowded.

VII. Petitioners will be denied the presence of codefendants who stand on equal footing with them, vis-a-vis the plaintiff, because the codefendants have been dismissed with prejudice on grounds which justify the dismissal of petitioners as well.

All of these stated reasons may be resolved to the two following fundamental principles.

I. The considerations of fundamental fairness demand that a change of venue instigated by the plaintiff be accompanied by a change of the applicable state law, including the appropriate statute of limitations.

What law controls — that of the transferor or that of the transferee forum — when the *plaintiff*, after choosing the initial venue for litigating his cause, at some later point *voluntarily* instigates and succeeds in securing a transfer to another district court where the case might originally have been brought? *Van Dusen v. Barrack*, 376 U.S. 612 (1964), settled the question of which law applied when a *defendant* secures a change of venue. However, the Supreme Court reserved the law-applicable issue when a *plaintiff* is responsible for a transfer.

> "A change of venue under §1404(a) [secured by a defendant] generally should be, with respect to state law, but a change of court rooms ... In so ruling, however, we do not and need not consider whether in all cases §1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a *plaintiff* sought transfer under §1404(a) ...."
>
> 376 U.S. at 639-640.

In this language, this Court has acknowledged that totally different considerations may govern plaintiff-acquired transfers. In response to this invitation, petitioner presents just such compelling considerations.

Plaintiff, in the first instance, has the opportunity to select the forum in which he desires to conduct the dispute, and traditionally his choice has been given deference. By the initial choice he may, to some extent, fix the law and procedures under which the case will be tried, thereby gaining an advantage over the defendants — especially where the choice of law provisions involve precepts in his favor.

In transferring the case, he seeks yet a second advantage, while attempting to retain the first. This case presents a good example. Here the plaintiff began his action in Washington, taking advantage of its longer statute of limitations for personal injury. Thereafter, finding that a defendant was unavailable for service in the District of Columbia, he desired not only to retain that statute of limitations, but to obtain service over the missing defendant. In all of these manipulations, the remaining defendants were dragged from the plaintiff's first choice of forum — in which the plaintiff had one advantage — to his next choice — where he attempted to gain a second advantage.

Through all of these machinations, the defendants, who gain nothing, are at the mercy of a scheming plaintiff and thereby are prejudiced. In this instance, a second transfer effected by the court *sua sponte*, only further served to shield the plaintiff from his own poor choice — once again to the detriment of the defendants. This Court should not countenance such conniving and, for these reasons, should resolve the issue against the plaintiff.

Although these considerations have not reached the Supreme Court, the lower courts which have examined them have resolved them adversely to the manipulating plaintiff.

Carson v. U-Haul Co., 434 F.2d 916 (6th Cir. 1970), confronted the exact issue presented here in the context of a statute of limitations. Plaintiffs, citizens of Georgia, sustained personal injuries in an automobile accident which occurred in Kentucky and involved non-Georgia defendants.

After unsuccessful attempts to obtain service of process over any of the three defendants in the action instituted in the Georgia federal court,[8] the *plaintiffs* moved for a transfer to the Eastern District of Kentucky, the situs of the accident where an original action might have been brought; and the district court transferred the case. Upon arrival in the Kentucky federal court, service was effected and defendants moved to dismiss on the grounds that the one-year Kentucky statute of limitations, rather than the two-year Georgia statute controlled — the complaint having been filed about one and one-half years after the occurrence. The district judge, relying on a western Kentucky federal decision, *Boughton v. Shoulders*, 116 F. Supp. 391 (W.D. Ky. 1953), applied the transferee [Kentucky] state's statute of limitations, which effectively barred the action even before it was begun in the transferor [Georgia] state. The Sixth Circuit affirmed that decision, denouncing the plaintiffs' approach as an attempt at forum shopping.

On appeal, the plaintiffs had relied heavily on *Van Dusen v. Barrack, supra*, where the law of the transferor state had been selected and applied on the basis that the transfer was nothing more than a change in courtroom and not in applicable law. However, the Court of Appeals

[8]The plaintiffs tried to obtain service on U-Haul and Aroca in the Georgia district court by serving the Secretary of that state, arguing that the corporations were doing business in Georgia. They were unable to obtain service at all upon Gracey.

accepted the *Van Dusen* invitation and weighed the other compelling concerns. Logically, that court explained:

> "We can see a good reason for transfer where it is done for convenience, or in the interest of justice to permit service of process to be obtained on a party. *Such a transfer,* however, *should not prejudice the fundamental rights of either party.*
>
> "But here the plaintiffs want more than merely to obtain service of process in Kentucky upon parties apparently not subject to service of process in Georgia; *they want to continue to retain Georgia as a forum state in order to apply that state's longer statute of limitations* ... if plaintiffs had filed suit in Kentucky instead of in Georgia, the Kentucky statute of limitations would have barred the claims. To allow the procedure which plaintiffs are now attempting to invoke would encourage *forum shopping.*" (emphasis supplied)
>
> 434 F.2d at 918.

In addition to these overwhelming factors, one other cogent reason demanded the application of the transferee's law:

> "There would have been no problem here if Kentucky's statute of limitations had not run before the suits were filed in Georgia. Such filing would have tolled the Kentucky statute of limitations if it had not already run ...
>
> "We do not question the validity of the transfer here. We hold that since the transfer was at the request of the plaintiffs, Georgia was no longer the forum state. Kentucky became the new forum state and its statute of limitations controlled."
>
> 434 F.2d at 918.

Within this language, one fundamental truth is manifest: the plaintiff's instigation of a transfer, for whatever reason it is affected, severs whatever relationship the suit had with the

transferor court and substitutes the transferee's law as if the case were filed there initially. Thus, having the benefit of the initial choice of forum, the plaintiff cannot leapfrog the case from district to district to the defendant's prejudice. *See also, Brown v. Merrow Machine Co.*, 411 F. Supp. 1161 (D. Conn. 1976).

In order to guarantee fairness in litigation, this court should adopt the position that the plaintiff transferred at his own peril: if, at his instance, a case becomes situated in an unsatisfactory or judgmental location, he must accept the consequences.

II. A transfer without the requisite procedural safeguards of notice and an opportunity to be heard is void *ab initio* and offends due process.

While 28 U.S.C. §1404(a) permits a change of venue "[f]or the convenience of the parties and witnesses, in the interest of justice", before so doing, a district court must first afford the resisting parties due process. In *Swindell-Dressler Corp. v. Dumbauld*, 380 F.2d 267, 273-274 (3d Cir. 1962), the Third Circuit adopted procedural requirements for granting a transfer motion:

> "In denying *Swindell* any hearing or opportunity for hearing the court below denied it procedural due process of law guaranteed to it by the Fifth Amendment. We point out that there was neither motion nor petition pending for transfer . . . The plain and unsubtle fact which is paramount here is that there was no notice or hearing before the order . . . purporting to affect the transfer . . . 'The right to notice and hearing is one of ancient origin and by due process clauses of the 5th and 14th Amendments has been safeguarded to all against deprivation by the federal government and the states respectively.'"

Irrespective of whether there was a transfer motion before the court, it cannot be gainsaid that, at the very least, notice and an opportunity to be heard are constitutionally demanded.

In this instance, the court merely *sua sponte* — without motion, without notice, and without an opportunity for a hearing — purported to retransfer the case from the Middle District of Pennsylvania to the District of Columbia, thereby denying petitioners due process of law.

This becomes significant in light of the choice of law argument. If the transfer is void *ab initio*, then the proper forum is Pennsylvania and, before the district court may reach the motion to transfer, it must determine the choice of law problem.

CONCLUSION

The considerations of fundamental fairness demand that a change of venue instigated by the plaintiff be accompanied by a change of the applicable state law, including the appropriate statute of limitations.

Further, before any transfer can be properly granted, the District Court must first afford the procedural safeguards of notice and an opportunity to be heard or else deny a party's rights to due process under the law.

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United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-1075

VOLKSWAGENWERK ARTIENGESELLSCHAFT and VOLKSWAGEN OF AMERICA, INC.,
Petitioners,

vs.

THE HONORABLE R. DIXON HERMAN, SELDON P. TODD, JR., CAMERON AUTO, INC. and VOLKSWAGEN ATLANTIC, INC.,
Respondents.

1/18/78 Petition for Writ of Mandamus received 1/12/78, filed. Four copies. Proof of Service of above petition received 1/18/78, filed.

Submitted on above petition. Coram: Gibbons and Hunter, Circuit Judges and Weber, District Judge.

1/27/78 Order. (*Gibbons* and Hunter, Circuit Judges and Weber, District Judge) denying petitioners Petition for Writ of Mandamus, filed.

1/27/78 Certified copy of above order to C. of D.C.

United States Court of Appeals

FOR THE THIRD CIRCUIT

January 18, 1978

No 78-1075

VOLKSWAGENWERK ARTIENGESELLSCHAFT
and VOLKSWAGEN OF AMERICA, INC.,
Petitioners,

vs.

THE HONORABLE R. DIXON HERMAN,
SELDON P. TODD, JR., CAMERON AUTO, INC.
and VOLKSWAGEN ATLANTIC, INC.,
Respondents,

Present: GIBBONS and HUNTER, *Circuit Judges,*
and WEBER, *District Judge.*

1. Petitioners' Petition for Writ of Mandamus, with Exhibits A, B, C, D and E

in the above-entitled case.

Respectfully,

/s/ T. F. QUINN, ESQUIRE
Clerk

enc.
kg

The foregoing Petition is denied.

By the Court,

/s/ JOHN J. GIBBONS
Judge

Dated: January 27, 1978

TODD, Seldon P., Jr.
VOLKSWAGENWERK ARTIENGESELLSCHAFT
A West German Corporation
VOLKSWAGEN OF AMERICA, INC.
A New Jersey Corporation
~~VOLKSWAGEN ATLANTIC, INC.~~
~~A Delaware Corporation~~ Dismissed as of Order 1/11/77
CAMERON AUTO, INC.
A Pennsylvania Corporation

CAUSE

28 U.S.C. 1332—Breach of Warranty, Negligence/Personal Injury/Collision
(District of Columbia Civ. No. 75-1255)

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Certified from the record
Date: 9/13/77
Donald R. Berry, *Clerk*

Per: /s/ E. G. KRAMER
Deputy Clerk

DOCKET ENTRIES
CIVIL NO. 75-1307

Date	Nr.	Proceedings
1975		
Oct. 24	1	ORIGINAL CASE FILE — transferred from U.S. District Court for the District of Columbia to M.D. of Penna. with certified copy of Docket Entries.
Oct. 24		J.S. 5.
Nov. 7	2	PRAECIPE — of appearance of Andew J. Banyas, III, Esq. For Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. only in this case.
		CERTIFICATE — of service.
Nov. 17	3	MOTION FOR ENLARGEMENT — of time for additional 45 days to file answer to complaint, and
		CONSENT — thereto by counsel for plaintiff, and
Nov. 21		ORDER — granting an extension of 45 days within which defts. are to respond to complaint. (H) Copies to Court & all Counsel from Hsbg.
Nov. 28	4	ANSWER — on behalf of Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc., and
		LETTER — stating copy was sent to counsel for pltff.
Dec. 31	5	SUMMONS NO. 2 — issued for service on Cameron Auto Inc. and on Volkswagen Atlantic, Inc. and with copies of Complaint handed U.S. Marshal for service.
1976		
Jan. 6	6	PRAECIPE — of appearance of G. Thomas Miller, Esq. as local counsel for pltff.
		CERTIFICATE — of service.

Date	Nr.	Proceedings
Jan. 20		SUMMONS — returned served 1/7/76 on Cameron and 1/14/76 on Volkswagen. (MF&E $13.21)
Feb. 17	7	ANSWER & CROSSCLAIM — of defendant, Cameron Auto, Inc., against all other defendants and Certificate of Service thereof.
Mar. 1	8	APPEARANCE — of Arthur Silverblatt, Esq., as counsel for Defendant, Volkswagen Atlantic, Inc.
Mar. 1	9	ANSWER — of Defendant, Volkswagen Atlantic, Inc. to Plaintiff's Complaint, and
Mar. 1		CERTIFICATE — of service thereof.
Mar. 19	10	ANSWER — of Volkswagen Atlantic, Inc. to Crossclaim of Cameron Auto, Inc., and
Mar. 19		CERTIFICATE — of service thereof.
Mar. 19	11	CROSS-CLAIM — of Defendant, Volkswagen Atlantic, Inc., against Volkswagen of America, Inc. and Volkswagenwerk Artiengesellschaft, and
Mar. 19		CERTIFICATE — of service thereof.
Mar. 22	12	REQUESTS — of Defendants Volkswagenwerk Artiengesselschaft and Volkswagen of America, Inc. for Admissions by Plaintiff and Letter of Service.
Mar. 25	13	INTERROGATORIES — of plaintiff directed to Volkswagen of America, Inc. and
		CERTIFICATE — of service thereof.
Mar. 25	14	INTERROGATORIES — of plaintiff directed to Volkswagenwerk Artiengesellschaft, and
		CERTIFICATE — of service thereof.

Date	Nr.	Proceedings
Mar. 25	15	INTERROGATORIES — of plaintiff directed to Volkswagen Atlantic, Inc. and
		CERTIFICATE — of service thereof.
Mar. 25	16	INTERROGATORIES — of plaintiff directed to Cameron Auto, Inc. and
		CERTIFICATE — of service thereof.
Apr. 12	17	ANSWER — of Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. to Crossclaim of Volkswagen Atlantic, Inc. and
Apr. 12		CERTIFICATE — of service thereof.
Apr. 12	18	ANSWER — of Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. to Crossclaim of Cameron Auto, Inc., and
Apr. 12		CERTIFICATE — of service thereof.
Apr. 14	19	AMENDED ANSWER — on behalf of Volkswagen Atlantic, Inc.
Apr. 19	20	INTERROGATORIES — to Volkswagen Atlantic, Inc. by Seldon P. Todd, Jr., C of S.
Apr. 20	21	ANSWER — of Plaintiff, Seldon B. Todd, Jr. to Requests of Defendants Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. for Admissions; and C of S.
Apr. 22	22	MOTION — of Defendant, Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. for enlargement of time within which to file Answers to Interrogatories propounded by Plaintiff for 60 days beyond the norman (sic) time period or until June 25, 1976, and

Date	Nr.	Proceedings
Apr. 22		LETTER — re service made on counsel.
Apr. 26	23	ORDER — extending time to 6/25/76 for defts. VOLKSWAGENWERK ARTIENGESELLSCHAFT & VOLKSWAGEN OF AMERICA to answer interrogatories propounded by pltff. (H) Copies to all counsel from Hsbg.
July 21	24	INTERROGATORIES — on behalf of the Defendant, Volkswagen of America, Inc., directed to the Plaintiff, and
July 21		CERTIFICATE — of service thereof.
July 21	25	ANSWERS — of Volkswagen of America, Inc. to Plaintiff's Interrogatories, and
July 21		CERTIFICATE — of service thereof.
July 21	26	ANSWERS — of Volkswagenwerk Artiengesellschaft to Plaintiff's Interrogatories, and
July 21		CERTIFICATE — of service thereof.
July 26	27	ANSWERS — of Cameron Auto, Inc. to interrogatories of plaintiff, and
		CERTIFICATE — of service thereof.
Aug. 4	28	AFFIDAVIT — of Defendant, Volkswagen of America, Inc. by its Attorneys, Meyer, Darragh, Buckler, Bebenek & Eck to within affidavit of Ian Ceresney, Atty. to Plaintiff's Interrogatories.
Aug. 4	29	AFFIDAVIT — of Ian Ceresney, Esq. member of the law firm of Herzfeld & Rubin, P.C., 40 Wall St., N.Y., U.S. counsel to Volkswagenwerk, to answers of Defendant Volkswagenwerk Artiengesellschaft to Plaintiff's Interrogatories, filed by Andrew J. Banyas, III, Esq.

Date	Nr.	Proceedings
Aug. 4	30	SUPPLEMENTAL INTERROGATORIES — on behalf of the Defendant, Volkswagen of America, Inc., directed to Plaintiff, and
Aug. 4		CERTIFICATE — of service thereof.
Aug. 27	31	CONSENT MOTION — for enlargement of time within which to file Answers to Interrogatories propounded by defendant Volkswagenwerk Artiengesellschaft, and
Aug. 27		CERTIFICATE — of service, and
Aug. 27		ORDER — that Plaintiff shall be granted an extension of 30 days beyond the date his Answers to the two sets of Interrogatories propounded by Defendant Volkswagenwerk Artiengesellschaft would otherwise be due, or until September 26, 1976 for the first set, and until October 5, 1976 for the second set. (H) Copies to counsel of record.
Sept. 13	32	MOTION — of Defendants Volkswagenwerk Artiengesellschaft and Volkswagen of America for summary Judgment, and C. of S.
Sept. 14	33	MOTION — of Defendant, Volkswagen Atlantic, Inc., for Summary Judgment, and
Sept. 14		CERTIFICATE — of service thereof.
Sept. 24	34	BRIEF — in support of defendants' Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. Motion for Summary Judgment; Letter of service attached.
Sept. 27	35	MOTION — of plaintiff for extension of time within which to answer interrogatories; C. of S. attached.

Date	Nr.	Proceedings
Sept. 28	36	MOTION — of deft. Cameron Auto, Inc. for Summary Judgment; C. of S. attached.
Oct. 1	37	PLTFF'S BRIEF — in opposition to DEFT. VOLKSWAGENWERK ARTIENGESELLSCHAFT'S motion for summary judgment. C of S.
Oct. 1	38	PLTFF'S BRIEF — in opposition to DEFT. VOLKSWAGEN OF AMERICA, INC.'S motion for summary judgment. C of S.
Oct. 1	40	PLTFF'S BRIEF — in opposition to DEFT. Cameron Auto, INC.'S motion for summary judgment. C of S.
Oct. 5	41	CERTIFICATE — of service that defendant's Cameron Auto, Brief in support of motion for summary judgment have been mailed to counsel.
Oct. 4	42	BRIEF — in support of deft. CAMERON AUTO, INC.'S MOTION FOR SUMMARY JUDGMENT. 2 cc to Court.
Oct. 12	43	BRIEF — in support of deft. Volkswagen Atlantic, Inc. Motion for Summary Judgment.; C. of S. therein. 2 CC to Court.
Oct. 12	44	BRIEF — of Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. in response to plaintiff's opposition to defts.' motion for summary judgment.
Oct. 12	45	PROPOSED ORDER — of Court, IT IS ORDERED and decreed that the plaintiff, Seldon P. Todd, Jr. shall be granted an extension of time until October 11, 1976, within which to answer the first set of Interrogatories propounded by defendant, Volkswagenwerk Artiengesellschaft. (H) C to Court and all counsel.

Date	Nr.	Proceedings
Oct. 27	46	INTERROGATORIES — on behalf of the deft., Volkswagen of America, Inc. directed to the pltff. C of S.
Nov. 5	47	SUPPLEMENTAL INTERROGATORIES — of Defendant, Volkswagen of America, Inc. directed to the plaintiff, and
Nov. 5		CERTIFICATE — of service thereof.
1977		
Jan. 11	48	MEMORANDUM — from Judge Herman and ORDER — of Judge Herman that the motions for summary judgment by defendants, Volkswagenwerk Artiengesellschaft, Volkswagen of America, and Cameron Auto, be and are hereby denied. IT IS FURTHER ORDERED that this case be and is hereby transferred to the US Court for the District of Columbia. — copies of Memo & order to counsel of record. (H office) (The motion for summary judgment by defendant Volkswagen Atlantic, be and is hereby granted and the action is dismissed as to said defendant)
		J.S. 6
Jan. 13		CASE FILE — transferred to Distr. of Columbia with cert. copy of docket entries. (Orig. copy of Order in Scranton File; cert. copy to Dist. of Columbia)
Jan. 28	49	MOTION — of Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. for Reconsideration of the denial of their motions for summary judgment, and
		ORDER — granting Motion for Reconsideration, and further ordering that all proceedings in the U.S. District Court for the Dist. of Columbia shall be stayed until further order of the Court. (H) copies Order to Counsel and Motion & Order to Clerk, D. of Columbia, together with letter from Clerk's office, Hbg.
Feb. 14	50	MOTION — of Defendants Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. for enlargement of time until February 18, 1977 to file Brief in support of their Motion for Reconsideration, and
Feb. 14		CERTIFICATE — of service thereof.
Feb. 16	51	BRIEF — of defendants, Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc., in support of defendants motion for reconsideration, and
		CERTIFICATE — of service. 2 copies to court from H office.
Feb. 18		ORDER (attached to Doc. 50) — Motion approved. Copy to counsel; Hbg office.
Feb. 28	52	PLAINTIFF'S BRIEF — opposing defendant's motion for reconsideration. C. of S. Two copies to court.
Mar. 7	53	BRIEF — of defendants, Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc., in response to plaintiff's brief in opposition to defendants motion for reconsideration, and C. of S. — copies to Court.
Mar. 9	54	NOTICE — of clerk for argument 3/22/77 in Hrsbg. at 11 AM. copies to counsel and court.

Date	Nr.	Proceedings
Mar. 22	55	MEMORANDUM — of Plaintiff in response to Defendants reply to Plaintiff's Opposition to Brief in support of Motion for Reconsideration, and
Mar. 22		CERTIFICATE — of service thereof.
Mar. 22	56	MINUTE SHEET — of Clerk re Motion of Defendant for Reconsideration of this Court's Order of January 11, 1977. Mr. Fink admitted specially for this case. Mr. Evans appears for Cameron Auto, Inc. and joins in above motion. Motion taken under advisement. (H)
May 3	57	LETTER — from Clerk in Harrisburg to Clerk in Washington asking for the return of the file so Court might refer to it concerning the motion for Reconsideration of order filed 1/11/77.
May 13	58	LETTER — to Clerk, dated 5/10/77, from James Davey, Clerk of District of Columbia, starting that he sent the case file to our Court.
Aug. 15	59	MEMORANDUM — from Court (H) Copies to Counsel from Hsbg.
Aug. 15	60	ORDER — from Court that motion of defts., Volkswagenwerk Artiengesellschaft, Volkswagen of America and Cameron Auto, Inc., for reconsideration of this Court's Order of 1/10/77 be and it is hereby denied, and that Order of 1/28/77, staying further proceedings in this matter be and it is hereby vacated. (H) Copies to counsel from Hsbg.
Aug. 17		In view of this Court's Order of August 15, 1977, denying defts. reconsideration of this

Date	Nr.	Proceedings
		Court's Order of 1/11/77, which denied defendants' Motions for Summary Judgment and directing that the case be transferred to the United States District Court, District of Columbia, original case file other than Documents #48, 59 and 60, transferred to the United States District Court, for the District of Columbia. Certified copies of Documents 48, 59 & 60 included in case file.
Aug. 24	61	MOTION — on behalf of defts. VOLKSWAGENWERK ARTIENGESELLSCHAFT AND VOLKSWAGEN OF AMERICA, INC. to amend its order in compliance with rule 54(b) of the FRCP and to certify its interlocutory order under 28 USC 1292(b).
Aug. 26	62	RECEIPT — from Clerk of Dist. Ct., Washington, DC for documents 1 thru 48 which were mailed to Wash., D.C.
Sept. 2	63	MOTION — of defendant, Cameron Auto, Inc. to amend its order and to certify its interlocutory order. C of S.
Sept. 6	64	OPPOSITION — of plaintiff to motion of defendants Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc., which asks this Court to amend its order of 1/10/77 to permit an interlocutory appeal. C. of S.
Sept. 6	65	BRIEF — of defendants, Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc., in support of motion document 61. C. of S.

Date	Nr.	Proceedings
Sept. 12	65	REPLY — of defendants Volkswagenwerk Artiengesellschaft and Volkswagen of America to plaintiff's opposition to certification. C. of S.

PLAINTIFFS

SELDON P. TODD, JR.

DEFENDANTS

1. VOLKSWAGENWERK ARTIENGESELLSCHAFT
   A West German Corporation
2. VOLKSWAGEN OF AMERICA, INC.
   A New Jersey Corporation
3. VOLKSWAGEN ATLANTIC, INC.
   A Delaware Corporation
4. CAMERON AUTO, INC.
   A Pennsylvania Corporation

CAUSE

BREACH OF WARRANTY, NEGLIGENCE/PERSONAL INJURY/COLLISION
28 USC 1332

ATTORNEYS

JULES FINK, ESQ.
8630 Fenton St., Suite #331
Silver Spring, Md. 20910

1 & 2: LAIDLER B. MACKALL
MARTIN D. SCHNEIDERMAN
STEPTOE & JOHNSON
1250 Conn. Ave., N.W. (36)

DOCKET ENTRIES

Date	Nr.	Proceedings
1976		
July 31		COMPLAINT; Appearance; Jury Demand.
July 31		SUMMONS Copies (4) and Copies (4) of Complaint issued.
Aug. 15		AFFIDAVIT of pltff. in support of proof of service/ c/m 8-15.
Aug. 21		MOTION of deft. #3 to quash purported return of service of process and to dismiss for lack of jurisdiction; P & A's; Exhibit (Unexecuted aff. of Raymond F. Glenn) c/m 8-20.
Aug. 25		MOTION of defts. to extend time to answer or otherwise plead; P & A's; c/m 8-25. APPEARANCE of Martin Schneiderman.
Sept. 2		MOTION of deft. for extension of time to file answer for additional 20 days, Approved (fiat) (N) Pratt, J.
Sept. 3		APPEARANCE of Laidler B. Mackall for defts. #1 & #2.
Sept. 5		AFFIDAVIT of Raymond F. Glenn.
Sept. 8		MOTION by pltff. to extend time to answer or otherwise plead to deft. #3 motion to quash; c/m 9-4.
Sept. 15		MOTION of plaintiff to transfer; P & A; c/s 9/12/75.
Sept. 26		ORDER granting motion of deft Volkswagen Atlantic to quash return of service and dismissing as to said deft. (N) Pratt, J.
Sept. 26		ORDER granting motion of pltff. to transfer case to USDC for the Middle District of Pennsylvania. (N) Pratt, J.

Date	Nr.	Proceedings
Oct. 20		ORIGINAL File and certified copy of docket sheets mailed to Clerk, USDC for the Middle District of Pennsylvania pursuant to Order of Sept. 26, 1975.
Oct. 28		ACKNOWLEDGEMENT from Clerk, USDC for the Middle District of Pennsylvania of receipt of original papers and certified copy of docket entries (#75-1307).
1977		
Jan. 17		CERTIFIED Copy of docket entries and case received and filed from the United States District Court for the Middle District of Pennsylvania.
Jan. 17		CERTIFIED copy of order transferring cause from the U.S. District Court for the Middle District of Pennsylvania to the U.S. District Court for the District of Columbia. Herman, J.
Jan. 31		LETTER dated 1-28-77 from Kenneth J. Mulholland, Deputy Clerk for USDC for the Middle District of Pennsylvania to James F. Davey, Clerk, USDC for the District of Columbia re copy of motion & order of defts. filed 1-28-77 in USDC for the Middle District of Pennsylvania; attachments (2).
Aug. 19		LETTER dated 8-17-77 from Frank Kurdziel, Chief Deputy Clerk, USDC for the Middle District of Pennsylvania to James F. Davey, Clerk USDC for the District of Columbia returning the entire case file pursuant to order of January 11, 1977; three (3) volumes sent from USDC for Middle District of Pennsylvania; certified copy of docket entries.

IN THE

United States Court of Appeals

THIRD JUDICIAL CIRCUIT

VOLKSWAGENWERK ARTIENGESELLSCHAFT and VOLKSWAGEN OF AMERICA, INC.,
Petitioners,

versus

THE HONORABLE R. DIXON HERMAN, SELDON P. TODD, JR., CAMERON AUTO, INC. and VOLKSWAGEN ATLANTIC, INC.,
Respondents.

No. 78-1075

PETITION OF VOLKSWAGENWERK ARTIENGESELLSCHAFT AND VOLKSWAGEN OF AMERICA, INC. FOR WRIT OF MANDAMUS

Petitioners Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. by their attorneys, MEYER, DARRAGH, BUCKLER, BEBENEK & ECK, petition this court to enter a writ of mandamus against respondents, pursuant to Rule 21 of the Federal Rules of Appellate Procedure, based upon the following:

1. Petitioner Volkswagen of America, Inc. is a New Jersey corporation with its principal place of business in New Jersey.

2. Petitioner Volkswagenwerk Artiengesellschaft is a West German corporation with its principal place of business in West Germany.

3. Respondent the Honorable R. Dixon Herman is a district judge of the United States District Court for the Middle District of Pennsylvania.

4. Respondent Seldon P. Todd, Jr. is an individual residing in and a citizen of the District of Columbia.

5. Respondent Cameron Auto, Inc. is a Pennsylvania corporation with its principal place of business in Pennsylvania.

6. Respondent Volkswagen Atlantic, Inc. is a Delaware corporation with its principal place of business in Pennsylvania.

7. Jurisdiction over a petition for a writ of mandamus in the United States Court of Appeals for the Third Circuit is predicated upon 28 U.S.C. §1651.

8. On January 24, 1973, plaintiff, while driving an automobile northward on Fifteenth Street, N.W. in Washington, D.C., was involved in an autombile accident with a car owned and operated by Calvin J. Verrett.

9. On July 31, 1975, as a result of the accident, the plaintiff instituted an action for personal injuries in the District Court for the District of Columbia, docketed at Civil Action No. 75-1255.

10. Although the plaintiff was able to obtain personal jurisdiction over petitioners and Respondent Cameron Auto, Inc., he attempted to obtain personal jurisdiction over Respondent Volkswagen Atlantic through Washington's long-arm statute, D.C. Code §§13-423(a) and 13-431(a)(3).

11. Thereafter, Volkswagen Atlantic moved to quash the service as being improper and to dismiss the case for lack of personal jurisdiction.

12. On September 25, 1975, the District Court for the District of Columbia granted Volkswagen Atlantic's motions.

13. Thereafter, the *Respondent-plaintiff Todd* moved, pursuant to 28 U.S.C. §1404(a), *voluntarily* to transfer the

action from the District of Columbia to the federal District Court for the Middle District of Pennsylvania.

14. On September 26, 1975, Judge John H. Pratt of the District of Columbia transferred the case to the Middle District of Pennsylvania.

15. Thereafter, in the Middle District of Pennsylvania, the plaintiff attempted once again to gain valid service over Respondent Volkswagen Atlantic and apparently was successful.

16. After the case was transferred to the Middle District of Pennsylvania, all parties engaged in extensive discovery on both issues of liability and damages.

17. Because the suit was not commenced until July 31, 1975 — more than two and one-half years after the accident — all of the defendants moved for summary judgment invoking the Pennsylvania two-year statute of limitations regarding personal injury actions, 12 P.S. §34, and four-year statute of limitations relating to actions for breach of warranty, 12A P.S. §2-725. The District of Columbia has a three-year statute of limitations for personal injury.

18. On January 10, 1977, after all parties had submitted briefs, but without benefit of oral argument or opportunity for rebuttal, the district judge in the Middle District of Pennsylvania granted Volkswagen Atlantic's motion for summary judgment on the ground that "the two-year Pennsylvania statute of limitations barred the action against Volkswagen Atlantic . . . ."

19. On that same day, the district judge denied the motions of the remaining defendants because "the action had been begun and service made within the three year limitation of the District of Columbia." At the same time "[c]oncluding that the interests of justice would best be served if plaintiff were permitted to pursue his claims

against [the remaining defendants] in the forum he had initially selected," the district court "retransferred" the case to Washington. There was no motion for "retransfer". A copy of the district court's Memorandum and Order is attached to and made a part of this petition and is designated Exhibit A.

20. Subsequently, the three defendants moved for reconsideration of that decision, based on two considerations:

a. the simultaneous granting of Volkswagen Atlantic's motion and the denial of the remaining defendants' motions distinguished between defendants in the same class thereby denying the remaining defendants equal protection; and

b. the retransfer of the case to the District of Columbia without a formal motion, notice or hearing constituted a denial of due process under the Fifth and Fourteenth Amendments of the Constitution.

A copy of the petitioners' motion is attached to and made a part of this petition, and is designated Exhibit B.

21. On August 15, 1977, the district court's memorandum refused to reconsider these matters, stating that it lost jurisdiction once it had forwarded the case file to the District of Columbia. A copy of the district court's memorandum is attached to and made a part of this petition, and is designated Exhibit C.

22. Thereafter, the petitioners timely filed motions for certification of questions of law under 28 U.S.C. §1292(b) and to amend the January 10, 1977 order to comply with Rule 54(b) of the Federal Rules of Civil Procedure. A copy of petitioners' motion is attached to and made a part of this petition, and is designated Exhibit D.

23. In an order dated January 3, 1978, and received by petitioners' counsel on Friday, January 6, 1978, the district court denied those motions. A copy of the court's order is attached to and made a part of this petition, and is designated Exhibit E.

24. As a result of these denials, petitioners have brought this petition to demand the application of the Pennsylvania two-year statute of limitations to the case which was transferred, upon plaintiff's motion, from the District of Columbia to the Middle District of Pennsylvania.

ISSUES

Statement of the Issues Presented

25. Petitioners seek the resolution of the following issues:

A. WHETHER THE DISTRICT COURT EXCEEDED ITS AUTHORITY IN TRANSFERRING THIS CASE TO THE DISTRICT OF COLUMBIA WITHOUT FIRST AFFORDING PETITIONERS THE REQUISITE PROCEDURAL SAFEGUARDS OF NOTICE AND AN OPPORTUNITY TO BE HEARD?

B. WHETHER THE DISTRICT COURT HAS FAILED TO EXERCISE PROPER JURISDICTION OF THIS CASE BECAUSE THE TRANSFER OF THE CASE WAS WITHOUT THE REQUISITE PROCEDURAL SAFEGUARDS AND THEREFORE WAS VOID?

C. WHETHER THE DISTRICT COURT, IN APPLYING DIVERSE STATUTES OF LIMITATIONS TO DEFENDANTS OF THE SAME CLASS, VIOLATED THE PETITIONERS' RIGHT TO EQUAL PROTECTION OF THE LAW?

D. WHETHER THE DISTRICT COURT HAS IMPROPERLY SELECTED AND APPLIED THE STATUTE OF LIMITATION OF THE TRANSFEROR FORUM — THE DISTRICT OF COLUMBIA — WHEN THE INITIAL TRANSFER FROM THAT FORUM TO THE MIDDLE DISTRICT OF PENNSYLVANIA WAS GRANTED VOLUNTARILY AND PURSUANT TO THE PLAINTIFF-RESPONDENT'S MOTION?

E. WHETHER THE DISTRICT COURT SHOULD HAVE APPLIED THE PENNSYLVANIA STATUTE OF LIMITATIONS TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND THEREFORE SHOULD HAVE GRANTED THAT MOTION?

Statement of Why the Writ Should Issue

26. The district judge without affording the petitioners the constitutionally-demanded safeguards of notice and an opportunity to be heard before retransferring the case from the Middle District to the District of Columbia, has exceeded its authority, has acted without jurisdiction or has failed to exercise its jurisdiction in a proper case. *Solomon v. Continental American Life Insurance Co.*, 472 F.2d 1043, 1045 (3d Cir. 1973); *Swindell-Dressler Corp. v. Dumbauld*, 308 F.2d 267, 272 (3d Cir. 1962). As a result of these failures, the retransfer to the District of Columbia is void and this Court should acknowledge that fact.

27. When the plaintiff seeks the transfer of a case from one forum to another, the district court must apply the choice of law provisions, including the applicable statute of limitations, of the transferee forum. *VanDusen v. Barrack*, 376 U.S. 612, 639-640 (1964); *Carson v. U-Haul Co.*, 434 F.2d

916 (6th Cir. 1970); *Boughton v. Shoulders*, 116 F. Supp. 391 (W.D. Ky. 1953); *Brown v. Merrow Machine Co.*, 411 F. Supp. 1162 (D. Conn. 1976).

28. In failing to apply the Pennsylvania two-year personal injury statute of limitations, the district court has selected and applied an incorrect legal precept. *Henry v. Richardson-Merrell, Inc.*, 508 F.2d 28, (3d Cir. 1975).

29. In this instance, the plaintiff attempted to sue all of the defendants in the District of Columbia, apparently to gain the advantage of its longer personal injury statute. Finding that it could not reach one punitive defendant, the plaintiff on his own initiative voluntarily had the case transferred to a venue in which he could reach that defendant, the Middle District of Pennsylvania.

30. The plaintiff sought the benefits of both service over the missing defendant and the application of the District of Columbia statute of limitations.

31. Under the applicable law, the Pennsylvania statute of limitations for personal injury should have been applied and the petitioners' motion for summary judgment, based upon the application of that statute, should have been granted.

32. The district court has treated defendants within the same category unequally in applying the Pennsylvania statute of limitations to defendant Volkswagen Atlantic and applying the Washington, D.C. statute of limitations to petitioners. Petitioners and Volkswagen Atlantic are defendants of the same status and there is no distinction among them.

Statement of the Relief Sought

33. The district court has exceeded its authority in transferring this case without first affording the petitioners

requisite procedural safeguards of notice and an opportunity to be heard and has failed to exercise proper jurisdiction because the district court has applied disparate statutes of limitations to identical defendants; and because the district court has applied the improper statute of limitations to the petitioners' motions for summary judgment, petitioners pray that this court enter a writ of mandamus demanding that:

1. the district court accept and retain jurisdiction over this case;
2. the district court apply the appropriate law, Pennsylvania's two-year personal injury statute of limitations;
3. the district court treat all of the defendants, including petitioners, equally by applying the same statute of limitations, i.e. that of Pennsylvania;
4. the district court grant the petitioners' motion for summary judgment on the ground that the plaintiff's action is barred by the Pennsylvania two-year personal injury statute of limitations, the limitation of the transferee jurisdiction.

Respectfully submitted,

MEYER, DARRAGH, BUCKLER,
BEBENEK & ECK

By ...../s/ ANDREW J. BANYAS, III.....
ANDREW J. BANYAS, III, ESQUIRE
MICHAEL V. GILBERTI, ESQUIRE
Attorneys for Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc.

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR.,
Plaintiff

v.

VOLKSWAGENWERK ARTIENGESELLSCHAFT, VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN ATLANTIC, INC. and CAMERON AUTO, INC., a Pennsylvania Corporation,
Defendants

Civil No. 75-1307

FILED
Harrisburg, Pa.
Jan. 11, 1977
Per /s/ DONALD R. BERRY, CLERK
Deputy Clerk

MEMORANDUM AND ORDER

This diversity action arises from an automobile accident which occurred in Washington, D.C., on January 24, 1973. Plaintiff alleges that the injuries he suffered in that accident were the result of faulty design and manufacture of the 1968 Volkswagen which he was driving. He seeks to recover damages on three theories: negligence, strict liability and breach of warranty.

Plaintiff commenced this action by filing a complaint in the United States District Court for the District of Columbia on July 31, 1975, well within that jurisdiction's three-year statute of limitations for personal injury actions. Service was successfully made on defendant Volkswagen Artiengesellschaft, Volkswagen of America and Cameron Auto, Inc. The fourth defendant, Volkswagen Atlantic, Inc. could not properly be served under the District of Columbia long-arm statute, and its motion to quash service and to dismiss for lack of jurisdiction was granted on September 24, 1975. Subsequently the court granted plaintiff's motion to transfer the action to this district, where it appeared that jurisdiction

could be had over all four defendants.[1] Before this court, all defendants have moved for summary judgment, contending that the action is barred by Pennsylvania's statutes of limitations applicable to actions for personal injuries (2 years)[2] and breach of warranty (4 years)[3].

There is no conflict of laws problem to be resolved in regard to the breach of warranty limitation period, as both Pennsylvania and the District of Columbia have adopted the Uniform Commercial Code, with its four-year limitation applicable to all contracts for sale. 12A P.S. § 2-725; D.C. Code § 28: 2-725[4]. This four-year period begins to run, in a breach of warranty action, at the time of tender of delivery of the allegedly defective goods, and not when the injury occurs. *Peeke v. Penn Central Transp. Co., Inc.*, 403 F.Supp. 70 (E.D. Pa. 1975); *Rufo v. Bastian-Blessing Co.*, 417 Pa. 107, 207 A.2d 823 (1965). Plaintiff purchased his Volkswagen on May 23, 1968 and began this action on July 31, 1975; thus the action is clearly time-barred, unless it comes within the exception as to future performance set forth in the second sentence of § 2-725(2).

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[1] Transfer was pursuant to 28 U.S.C. §1404(a), which reads: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[2] 12 P.S. §34

[3] 12 A P.S. §2-725

[4] §2-725 provides, in pertinent part:

"(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

"(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."

There is nothing in the record to indicate that any explicit warranty extending to future performance was given in connection with the sale of plaintiff's Volkswagen.[5] The warranty upon which plaintiff seeks to recover is an implied one that the automobile manufactured by defendants would provide reasonable protection to its occupants in the event of collision. This is not within the exception of § 2-725(2). To apply this exception, as plaintiff urges, to an implied warranty merely because the alleged breach was not readily discoverable would completely negate the provision of § 2-725(1) that the cause of action accrues "when breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." See *General Motors Corp. v. Tate*, 516 S.W. 2d 602 (Ark. 1974).

The second question before us is whether, as to plaintiff's claims based on negligence and strict liability, the three-year limitation period of the District of Columbia or the two-year limitation period of Pennsylvania should be applied. The leading case in this area is *Van Dusen v. Barrack*, 376 U.S. 612, 11 L.Ed.2d 945 (1964), in which it was held that where the defendant procures a transfer under 28 U.S.C. § 1404(a), the transferee court is obligated to apply the law that would have been applied if there had been no change of venue.[6] The *Van Dusen* decision was based largely on the policy set forth in *Erie Railroad Co. v.*

[5] A copy of the standard Volkswagen warranty is attached to defendants' "Brief in Respone to Plaintiff's Brief in Opposition to Defendants' . . . Motion for Summary Judgment." The warranty covers all defects in materials or workmanship for the first 24 months or 24,000 miles of normal use, but makes no representations whatever as to the automobile's "crashworthiness".

[6] Although *Van Dusen* did not deal specifically with statutes of limitations, subsequent cases have recognized that the rule announced therein applies to statutes of limitations as well as to matters of substantive law. *Alabama Great Southern R. Co. v. Allied Chemical Corp.*, 467 F.2d 679 (5th Cir. 1972); *Bott v. American Hydrocarbon Corp.*, 441 F.2d 896 (5th Cir. 1971).

Tompkins, 304 U.S. 64, 82 L.Ed. 1188 (1938), that the "accident" of federal diversity jurisdiction should not enable a party to achieve a result different than that which could be achieved in the courts of the state where the action was filed. 376 U.S., at 637, 11 L.Ed.2d, at 962.

The instant case differs from *Van Dusen* in that here the plaintiff rather than the defendant has sought the change of venue. The Court in *Van Dusen* specifically declined to decide whether the law of the transferor state must be applied in such a situation, 376 U.S., at 639-40, 11 L.Ed.2d, at 963, and the lower federal courts have reached differing conclusions. In *Watwood v. Barber*, 70 F.R.D. 1 (N.D. Ga. 1975), the court allowed the plaintiffs to avail themselves of Georgia's longer statute of limitations after transfer from Alabama, where the action was time-barred.[7] A contrary result was reached in *Schenk v. Piper Aircraft Corp.*, 377 F.Supp. 477 (W.D. Pa. 1974), wherein the court refused to transfer the action to Ohio, assuming that Pennsylvania's two-year statute of limitations would continue to act as a bar to the action despite Ohio's more liberal three-year period. In *Mata v. Budd Co.*, 44 F.R.D. 225 (E.D. Pa. 1968) another Pennsylvania court refused to permit transfer to the District of Columbia, it appearing that the plaintiff could not have affected service on the defendant in the District of Columbia if the action had been commenced there.

The closest case factually to the one at bar, *Carson v. U-Haul Co.*, 434 F.2d 916 (6th Cir. 1970), arose from an

[7] Similarly, in *Les Schwimley Motors, Inc. v. Chrysler Motor Corp.*, 270 F.Supp. 418 (E.D. Cal. 1967), a court in California, where the statute of limitations had run, granted plaintiff's motion to transfer the case to Nevada, assuming that Nevada's longer limitation period would permit the action to proceed there. A major factor underlying both *Les Schwimley* and *Watwood, supra*, was the fact that the transferee jurisdiction had more significant contacts with the case than the transferor jurisdiction, and thus would have been the more appropriate forum in which to have originated the action.

automobile accident in Kentucky. Plaintiffs, residents of Georgia, brought suit in the Northern District of Georgia within the applicable two-year limitation period. The Georgia court's jurisdiction over any defendant was doubtful, but before the court ruled on the question of its jurisdiction, plaintiffs moved to transfer the action to the Eastern District of Kentucky. The motion to transfer was granted, and the Kentucky court then dismissed the action on the grounds that it was barred by Kentucky's one-year statute of limitations. The Court of Appeals for the Sixth Circuit affirmed, finding that allowing plaintiffs to retain the benefit of both the longer Georgia statute of limitations and the service of process available in Kentucky would prejudice the fundamental rights of the defendant, and that such a result was not intended by the transfer statute.

The policy stated by the Supreme Court in *Van Dusen, supra*, dictates a result in this case similar to that of the *Carson* decision, *supra*. By the time plaintiff filed this action it was too late to use the Pennsylvania courts as a forum. His only choice then was to bring suit in the District of Columbia and accept the accompanying problem of service upon Volkswagen Atlantic. To now allow plaintiff to avail himself of the service of process available in Pennsylvania while retaining the statute of limitations of the District of Columbia would be to give him an advantage over the defendant, Volkswagen Atlantic, which would be available in neither Pennsylvania nor the District of Columbia in the absence of diversity jurisdiction. This is exactly the sort of legal maneuvering that was condemned in *Van Dusen*, albeit attempted by the defendant in that case. Accordingly, the action will be dismissed as to Volkswagen Atlantic.

Neither *Van Dusen* nor *Carson*, however, compels dismissal of the case as to the three remaining defendants. Plaintiff has done everything necessary to preserve his rights

against these defendants under the laws of the District of Columbia, having filed within the limitation period and successfully served process upon them. A subsequent improvident transfer in an attempt to obtain jurisdiction over the fourth defendant should not defeat the original timely filing. Plaintiff has indicated in his brief that he would be amenable to retransfer of the case to the District of Columbia should we hold that the Pennsylvania statute of limitations bars the action in this court. We agree that retransfer is the proper course. The action was properly begun in the District of Columbia, and the transfer having proved futile, the interests of justice can best be served by returning it to the District of Columbia.

An appropriate order will be entered.

/s/ R. DIXON HERMAN
R. Dixon Herman
United States District Judge

Dated: January 10th, 1977.

Exhibit A

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR.,
Plaintiff
v.
VOLKSWAGENWERK ARTIENGE-SELLSCHAFT, VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN ATLANTIC, INC. and CAMERON AUTO, INC., a Pennsylvania Corporation,
Defendants

Civil No. 75-1307

FILED
Harrisburg, Pa.
Jan. 11, 1977
Per /s/ DONALD R. BERRY, CLERK
Deputy Clerk

ORDER

AND Now, this 10th day of January, 1977, IT IS ORDERED that the motion for summary judgment by defendant Volkswagen Atlantic, Inc. be and is hereby granted and the action is dismissed as to said defendant.

IT IS FURTHER ORDERED that the motions for summary judgment by defendants, Volkswagenwerk Artiengesellschaft, Volkswagen of America, Inc. and Cameron Auto, Inc., be and are hereby denied.

IT IS FURTHER ORDERED that this case be and is hereby transferred to the United States District Court for the District of Columbia.

/s/ R. DIXON HERMAN
R. Dixon Herman
United States District Judge

Exhibit A

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR.
Plaintiff
vs.
VOLKSWAGENWERK ARTIENGESELL-SCHAFT
A West German Corporation
and
VOLKSWAGEN OF AMERICA, INC.
A New Jersey Corporation
and
VOLKSWAGEN ATLANTIC, INC.
A Delaware Corporation
and
CAMERON AUTO, INC.
A Pennsylvania Corporation
Defendants

Civil Action No. 75-1307

FILED
Harrisburg, Pa.
Oct. 12, 1976
Per /s/ DONALD R. BERRY, CLERK
Deputy Clerk

PROPOSED ORDER OF COURT

AND Now, To WIT, this 11th day of October, 1976, upon presentation of the within Motion and consideration of same, it is hereby ordered and decreed that the Plaintiff, Seldon P. Todd, Jr. shall be granted an extension of time until October 11, 1976, within which to answer the first set of Interrogatories propounded by Defendant, Volkswagenwerk Artiengesellschaft.

BY THE COURT

/s/ R. DIXON HERMAN

10-12-76

This Order consented to

By: /s/ ANDREW J. BANYAS
Attorney for Volkswagenwerk Artiengesellschaft

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR.,
Plaintiff

versus

VOLKSWAGENWERK ARTIENGE-SELLSCHAFT, VOLKSWAGEN OF AMERICA, INC. VOLKSWAGEN ATLANTIC, INC. and CAMERON AUTO, INC., a Pennsylvan corporation,
Defendants.

Civil Action No. 75-1307

MOTION FOR RECONSIDERATION

AND NOW come Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc., two of the above named defendants by their attorneys, MEYER, DARRAGH, BUCKLER, BEBENEK & ECK, and file the within motion for reconsideration of the denial of their motions for summary judgment and state the following reasons in support thereof:

1. The plaintiff initially filed the within lawsuit on July 31, 1975, in the United States District Court for the District of Columbia, at Civil Action No. 75-1255 seeking damages for injuries sustained on January 24, 1973 in a motor vehicle accident occurring on 15th Street, NW, Washington, D.C.

2. In the District of Columbia action, the defendant, Volkswagen Atlantic, Inc., filed a motion to quash purported return of service of process and to dismiss for lack of jurisdiction.

3. An order of court granting motion of Volkswagen Atlantic, Inc. was signed on September 25, 1975.

4. Subsequent thereto, the plaintiff filed a motion to transfer the action from the United States District Court for the District of Columbia to the United States District Court for the Middle District of Pennsylvania.

5. On September 26, 1975, an order of court was signed transferring the within action to the Middle District of Pennsylvania pursuant to 28 U.S.C. §1404(a).

6. In paragraph 7 of the plaintiff's complaint, it is alleged that plaintiff purchased the vehicle which is the subject matter of this action from the defendant, Cameron Auto, Inc., on or about May 23, 1968.

7. Paragraph 9 of the plaintiff's complaint it is alleged that the accident which is the subject matter of the within lawsuit occurred on or about January 24, 1973.

8. The defendants, Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc., filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, seeking a summary judgment in their favor, asserting that the Pennsylvania two year statute of limitations relating to personal injury actions was applicable to the within action, thereby barring the same.

9. In ruling upon the above named defendants' motion for summary judgment, the Honorable R. Dixon Herman, stated in his memorandum and order of January 10, 1977, that "the policy stated by the Supreme Court in ***VanDusen, supra.***, dictates a result in this case similar in that of the Carson decision, supra. By the time the plaintiff filed this action, it was too late to use the Pennsylvania Courts as a forum."

10. The above named defendants also asserted in the aforementioned motion for summary judgment that the four year statute of limitations relating to actions for breach of warranty was also applicable to the within action and also acted as a bar to the same.

11. In ruling upon the above named defendants' motion for summary judgment, the Honorable R. Dixon Herman stated in his memorandum and order of January 10, 1977 that:

> "There is no conflict of laws problem to be resolved in regard to the breach of warranty, as both Pennsylvania and the District of Columbia have adopted the Uniform Commercial Code, with its four-year limitation applicable to all contracts for sale. 12A P.S. §2-725; D.C. Code §28; 2-725.[4] This four-year period begins to run, in a breach of warranty action, at the time of tender of delivery of the allegedly defective goods, and not when the injury occurs. (citations omitted) Plaintiff purchased his Volkswagen on May 23, 1968 and began this action on July 31, 1975; thus the action is clearly time-barred unless it comes within the exception as to future performance set forth in the second sentence of §2-725.
>
> (2) There is nothing in the record to indicate that any explicit warranty extending to future performance was given in connection with the sale of plaintiff's Volkswagen. The warranty upon which plaintiff seeks to recover is an implied one that the automobile manufactured by defendants would provide reasonable protection to its occupants in the event of a collision. This is not within the exception of §2-725(2)." (footnote omitted)

12. The order accompanying the court's opinion and dated January 10, 1977 granted the motion for summary judgment by defendant, Volkswagen Atlantic, Inc. and dismissed the action as to said defendant.

13. The January 10, 1977 order then disposed of the motions for summary judgment by defendants, Volkswagenwerk Artiengesellschaft, Volkswagen of America, Inc. and Cameron Auto, Inc. by denying the same.

14. The motion for summary judgment by defendant Volkswagen Atlantic, Inc. asserted the Pennsylvania two year statute of limitations relating to personal injury actions as a bar to the plaintiff's action as well as to the four-year statute of limitations relating to actions for breach of warranty as a bar to plaintiff's action.

15. The motions for summary judgment by defendants, Volkswagenwerk Artiengesellschaft, Volkswagen of America, Inc. and Cameron Auto, Inc. asserted the same statutes of limitations as did Volkswagen Atlantic, Inc. as a bar to plaintiff's action.

16. The granting of the motion for summary judgment by defendant, Volkswagen Atlantic, Inc., and the denying of the remaining defendants' motions for summary judgment distinguishes between defendants in the same class and is therefore a denial to said defendants of the right to equal protection under the law.

17. The plaintiff indicated in his brief in opposition to the various defendants' motions for summary judgment that he would be amenable to retransfer of the case to the District of Columbia should this Honorable Court hold that the Pennsylvania statutes of limitations bar his action in this Honorable Court.

18. To date, the plaintiff has never filed a motion for transfer or a petition for transfer with your Honorable Court. Prior to issuance of the order retransferring this case to the District of Columbia, no notice was given to any of the parties involved, there was no hearing on the matter of transfer and the parties were not given an opportunity to be heard before the court.

19. The order of January 10, 1977, directed that this case be transferred to the United States District Court for the District of Columbia.

20. Failure to give the defendants notice, hold a hearing on the matter of transfer, and provide the defendants with an opportunity to be heard is a denial of due process guaranteed under the Fifth Amendment of the Constitution of the United States.

WHEREFORE, your Honorable Court is respectfully requested to reconsider the denial of defendants' motions for summary judgment.

Respectfully submitted,

MEYER, DARRAGH, BUCKLER, BEBENEK & ECK

By .....
Andrew J. Banyas, III, Esquire
Attorney for Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc.

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR.,
Plaintiff,
versus
VOLKSWAGENWERK ARTIENGE-SELLSCHAFT, VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN ATLANTIC, INC. and CAMERON AUTO, INC., a Pennsylvania Corporation,
Defendants.

Civil Action No. 75-1307

ORDER

AND NOW, TO WIT, this 28th day of January, 1977, it is hereby ordered that the within motion for reconsideration of the defendants' motions for summary judgment is hereby granted. It is further ordered that all proceedings in the United States District Court for this District of Columbia shall be stayed until further order of the court.

BY THE COURT:

.....
R. Dixon Herman, J.

Exhibit B

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served upon the following counsel of record by depositing the same in the United States Mail, postage prepaid, in Harrisburg, Pennsylvania, on January 28, 1977:

Jules Fink, Esquire
KATZ AND FINK
331 Mongomery Center Building
8631 Fenton Street
Silver Spring, Maryland 20910
Attorneys for Plaintiff

G. Thomas Miller, Esquire
McNEES, WALLACE AND NURICK
Post Office Box 1166
Harrisburg, Pennsylvania 17108
Attorneys for Plaintiff

Arthur Silverblatt, Esquire
SILVERBLATT AND TOWNEND
1400 United Penn Bank Building
Wilkesbarre, Pennsylvania 18701
Attorneys for Defendant,
Volkswagen Atlantic, Inc.

GOLDBERG, EVANS AND KATZMAN
Post Office Box 966
Harrisburg, Pennsylvania 17108
Attorneys for Defendant,
Cameron Auto, Inc.

MEYER, DARRAGH, BUCKLER,
BEBENEK & ECK

By ..../s/ ANDREW J. BANYAS, III.....
Andrew J. Banyas, III, Esquire
2500 Grant Building
Fourth and Grant Streets
Pittsburgh, Pennsylvania 15219
Attorneys for Defendants,
Volkswagenwerk Artiengesellschaft
and Volkswagen of America, Inc.

Exhibit C

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR.,
Plaintiff

v.

VOLKSWAGENWERK ARTIENGE-
SELLSCHAFT, et al.,
Defendants

Civil Action
No. 75-1307
FILED
Harrisburg, Pa.
Aug. 15, 1977
Per /s/ DONALD R. BERRY, CLERK
Deputy Clerk

MEMORANDUM

This is an action for personal injuries resulting from an automobile accident which occurred in the District of Columbia. The suit was begun in the District Court for the District of Columbia within that jurisdiction's three year statute of limitations, and proper service was made on three of the defendants. The fourth defendant, Volkswagen Atlantic, was not amenable to service in the District of Columbia, and plaintiff secured a transfer to this district, where it appeared that personal jurisdiction could be had of all defendants.

In this court all defendants moved for summary judgment on the basis of Pennsylvania's statutes of limitations. In a memorandum and order dated January 10, 1977, we held that the breach of warranty claim against all defendants was barred by the four year[1] limitation period contained in the Uniform Commercial Code, which applies in both Pennsylvania and the District of Columbia. 12A P.S. § 2-725; D.C. Code 28:2-725. As to the personal injury claim, we concluded that the two year Pennsylvania statute of limitations barred the action against Volkswagen Atlantic,

[1] The automobile was purchased on May 23, 1968 and the action filed in the District of Columbia on July 31, 1975.

and accordingly granted summary judgment as to that defendant. We declined, however, to apply the Pennsylvania statute for personal injuries to the remaining three defendants, against whom the action had been begun and service made within the three year limitation period of the District of Columbia. Concluding that the interests of justice would best be served if plaintiff were permitted to pursue his claims against these defendants in the forum he had initially selected, we retransferred the case to the District Court for the District of Columbia.

The three remaining defendants, Volkswagenwerk Artiengesellschaft, Volkswagen of America and Cameron Auto, Inc.,[2] have moved for reconsideration of our decision to retransfer the case to the District of Columbia, contending that: (1) the entry of the transfer order without a formal motion and hearing denied defendants due process of law;[3] and (2) granting the motion for summary judgment of Volkswagen Atlantic, while denying that of the other, similarly situated defendants denied defendants equal protection of the law.

The law appears clear that, having forwarded the file to the District of Columbia court, we have lost all jurisdiction of the case, and could not vacate the transfer order even if so inclined.[4] *Starnes v. McGuire*, 512 F.2d 918 (D.C. Cir. 1974);

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[2] A written motion and supporting briefs were filed on behalf of Volkswagenwerk Artiengesellschaft and Volkswagen of America. At oral argument counsel for Cameron Auto, Inc. appeared and indicated that Cameron Auto joined in the motion of the other defendants.

[3] Although no formal motion was made, transfer was suggested by plaintiff in his "Opposition to Defendant Volkswagenwerk Artiengesellschaft's Motion for Summary Judgment" (Document No. 37), at 6. The question of transfer was also discussed, albeit cursorily, in defendants' "Brief in Response to Plaintiff's Brief in Opposition to ... Motion for Summary Judgment" (Document No. 44), at 9.

[4] It has been suggested that the proper course for obtaining review of a completed transfer is a motion for retransfer in the transferee District of

(continued)

Swindell-Dressler Corp. v. Dumbauld, 308 F.2d 276 (3d Cir. 1962); *Drabik v. Murphy*, 246 F.2d 408 (2d Cir. 1959); *Wilson v. Ohio River Co.*, 236 F. Supp. 96 (S.D. W. Va. 1964). Thus any discussion of the propriety of our entering the order for transfer without formal motion or hearing would be futile.

Defendants' claim of denial of equal protection requires some discussion, as it appears to reflect a misunderstanding of the basis of our transfer order, and thus leads us to suspect that our reasoning was not expressed with adequate clarity. Since this order may ultimately be the subject of appellate review, we feel compelled to briefly clarify the rationale upon which it was based.

As we pointed out in our prior memorandum, the starting point for analysis of the choice of law problem is *Van Dusen v. Barrack*, 376 U.S. 612, 11 L.Ed.2d 945 (1964), wherein the Court held that when a *defendant* procures a transfer under 28 U.S.C. § 1404 (a), the transferee court is obligated to apply the law that would have been applicable in the transferor court. The Court specifically declined to decide what law must be applied in cases where, as here, the change of venue has been granted at the request of the *plaintiff;* but clearly stated that the central concern in analyzing the effect of a transfer under § 1404 (a) is "to ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the state where the action was filed." 376 U.S. at 638, 11 L.Ed. 2d at 962. Emphasizing the applicability of the rule of *Erie R. Co. v. Thompkins*, 304 U.S. 64, 82 L.Ed. 1188 (1938), the Court further stated that "the critical identity to be maintained is between the federal district court which decides the case and the courts of the state in which the action was filed." 376 U.S. at 639, 11 L.Ed. 2d at 962.

Columbia court, which can then be reviewed by the transferee circuit. *Starnes v. McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974).

Consistently with the policy stated in *Van Dusen, supra*, Professor Moore has concluded that no immutable choice of law rule can be satisfactorily applied to all cases involving plaintiff-initiated transfer, reasoning thus:

> When the venue is proper in the transferor district,[5] and service can be obtained there, there appears to be no technical reason why the transfer might not be made, and whatever dissembling is involved in seeking both the most favorable law and the most convenient forum, the plaintiff does not seek the application of the law of a state that he could not obtain. In such a case, then, it appears that the *Van Dusen* rule should apply after such a transfer, though in weighing the "interests of justice" a court might be reluctant to give much weight to plaintiff's convenience.
>
> When the venue in the district in which the action is brought is proper, but service of process cannot be had there, different considerations apply. In such a situation plaintiff could not maintain his action in the district in which he filed it, and therefore could not take advantage of the law governing that district, since he could not obtain jurisdiction of the defendant. Therefore he should not be permitted to file his action there for the purpose of capturing the law of that jurisdiction for transportation to the jurisdiction in which service of process can be obtained. In one fashion or another courts have resisted such a maneuver.
>
> 1 *Moore's Federal Practice* ¶0.145 [.4-5], at 1608.

Applying Professor Moore's analysis to the instant case, we find a very real distinction between the position of Volkswagen Atlantic and that of the other defendants which justifies the different treatment of the motions for summary judgment.

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[5] The quoted passage addresses the status of the suit prior to our order of January 10, 1977, at which time the District of Columbia was the *transferor* jurisdiction.

Plaintiff timely filed has action and effected service on Volkswagenwerk Artiengesellschaft, Volkswagen of America and Cameron Auto in the District of Columbia, and thus, in our view, earned the right to litigate his claims against those defendants under the law of the District of Columbia regardless of any subsequent change of venue. As to Volkswagen Atlantic, plaintiff was in an entirely different position, as there was no personal jurisdiction in the District of Columbia, and thus the law of that forum never "attached". Plaintiff was then in a position of seeking a jurisdiction where his claim against Volkswagen Atlantic could be litigated. Pennsylvania was such a jurisdiction, but for the major problem of a shorter statute of limitations; so plaintiff sought to avoid this unfavorable aspect of Pennsylvania law by "importing" the law of a jurisdiction where the action could never have been maintained against Volkswagen Atlantic. To allow plaintiff to obtain jurisdiction through this sort of stratagem would have been fundamentally unfair to the defendant, Volkswagen Atlantic, and clearly contrary to the policy enunciated in *Van Dusen, supra*. We therefore applied the Pennsylvania statute of limitations to prevent such a result.

The transfer to this district was an attempt to take improper advantage of Volkswagen Atlantic, but it was wholly innocent as to the other three defendants. Plaintiff did not seek to gain through the transfer any rights against these defendants that had not already been secured in the District of Columbia. To permit these defendants to use the transfer to defeat a suit which was properly commenced in accordance with the law of the transferor jurisdiction would have been grossly unfair to plaintiff, and we therefore denied their motions for summary judgment.

Our retransfer of the case was not, as defendants suggest, an alternative to dismissal. Had we not retransferred the case, the only fair course would have been to

permit the case to go to trial here under the law of the District of Columbia. Given this choice, retransfer to the District of Columbia seemed to be much the more desirable course, as that is the jurisdiction in which the cause of action arose, in which plaintiff originally elected to bring suit, and in which the court's grasp of the applicable law is certainly superior to ours.

The motion for reconsideration will be denied.

An appropriate order will be entered.

/s/ R. DIXON HERMAN
R. Dixon Herman
United States District Judge

Dated: August 15, 1977.

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Seldon Todd, Jr.

v.

Volkswagenwerk Artiengesellschaft
Volkswagen of America, Inc.

No. 75-1307
RECEIVED
Mar. 12, 1977
Meyer, Darragh, Buckler, Bebenek and Eck

TAKE NOTICE that the above-entitled case has been set for Motion for Reconsideration of this Court's Order dated Jan. 11, 1977 at 11 o'clock A.M., on Tuesday, March 22, 1977, at Courtroom #1, Ninth Floor, Federal Building, Third and Walnut Streets, Harrisburg, PA

/s/ DONALD R. BERRY
Clerk.

By /s/ CAROL L. STECHER,
CAROL L. STECHER
Deputy Clerk.

Date March 9, 1977

To: Jules Fink, Esquire
G. Thomas Miller, Esquire
Andrew J. Banyas, III, Esquire
Virginia Loria, Court Reporter
Honorable R. Dixon Herman, Judge

Exhibit C

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR.,
Plaintiff

v.

VOLKSWAGENWERK ARTIENGE-SELLSCHAFT, et al.,
Defendants

Civil No. 75-1307

FILED
Harrisburg, Pa.
Aug. 15, 1977
Per /s/ DONALD R. BERRY, CLERK
Deputy Clerk

ORDER

AND NOW, this 15th day of August, 1977, IT IS ORDERED that the motion of defendants, Volkswagenwerk Artiengesellschaft, Volkswagen of America and Cameron Auto, Inc., for reconsideration of this court's order of January 10, 1977 be and it is hereby denied.

IT IS FURTHER ORDERED that our order of January 28, 1977, staying further proceedings in this matter be and it is hereby vacated.

/s/ R. DIXON HERMAN
R. Dixon Herman
United States District Judge

Dated: August 15th, 1977.

Exhibit D

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR.,
Plaintiff

versus

VOLKSWAGENWERK ARTIENGESELLSCHAFT, VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN ATLANTIC, INC., and CAMERON AUTO, INC., a Pennsylvania corporation,
Defendants.

Civil Action No. 75-1307

MOTION ON BEHALF OF DEFENDANTS VOLKSWAGENWERK ARTIENGESELLSCHAFT AND VOLKSWAGEN OF AMERICA, INC. TO AMEND ITS ORDER IN COMPLIANCE WITH RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND TO CERTIFY ITS INTERLOCUTORY ORDER UNDER 28 U.S.C. §1292(b)

The defendants Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. by their attorneys, MEYER, DARRAGH, BUCKLER, BEBENEK & ECK, move that this Honorable Court certify and make final its grant of summary judgment in favor of Defendant Volkswagen Atlantic, Inc., pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and certify its interlocutory order under 28 U.S.C. § 1292(b), based on the following reasons:

1. Plaintiff initially filed this lawsuit on *July 31, 1975* in the United States District Court for the District of Columbia,

at Civil Action No. 75-1255, seeking damages for injuries sustained, on *January 24, 1973*, in a motor vehicle accident on Fifteenth Street, N.W., Washington, D.C. The complaint named as defendants Volkswagenwerk Artiengesellschaft, Volkswagen of America, Inc., Volkswagen Atlantic, Inc. and Cameron Auto, Inc.

2. Thereafter, in the District of Columbia, the defendant, Volkswagen Atlantic, Inc., moved to quash the service and to dismiss the case for lack of jurisdiction.

3. On September 25, 1975, the court granted Volkswagen Atlantic's motion.

4. Subsequently, the plaintiff moved to transfer the action from the United States District Court for the District of Columbia to the United States District Court for the Middle District of Pennsylvania in an attempt to obtain proper jurisdiction over Volkswagen Atlantic, Inc.

5. On September 26, 1975, the court ordered the transfer to the Middle District of Pennsylvania pursuant to 28 U.S.C. §1404(a).

6. Defendants Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, on the ground that the Pennsylvania two-year statute of limitations relating to personal injury actions applied to the action *sub judice* thereby barring this action.

a. Paragraph 7 of the complaint alleged that plaintiff had purchased the automobile which is the subject matter of this action from Defendant Cameron Auto on or about May 23, 1968.

b. Paragraph 9 of the plaintiff's complaint alleged that the accident underlying the lawsuit occurred on or about January 24, 1973.

c. This lawsuit was filed on January 31, 1975 — more than two years after the accident — in the District Court for the District of Columbia.

7. In response to the defendants' motions, the Honorable R. Dixon Herman without the benefit of oral argument, granted a summary judgment in favor of Defendant Volkswagen Atlantic, Inc., stating that:

> "[b]y the time plaintiff filed this action it was too late to use the Pennsylvania courts as a forum. His only choice then was to bring suit in the District of Columbia and accept the accompanying problem of service upon Volkswagen Atlantic."

8. At the same time, the court also denied the motions of Defendants Volkswagenwerk Artiengesellschaft, Volkswagen of America, Inc. and Cameron Auto, Inc. because:

> "Plaintiff has done everything necessary to preserve his rights against these defendants under the laws of the District of Columbia, having filed within the limitation period and successfully served process upon them."

9. The court simultaneously ordered the transfer of the case back to the District of Columbia, on the ground that:

> "A subsequent inprovident transfer in an attempt to obtain jurisdiction over the fourth defendant should not defeat the original timely filing. Plaintiff has indicated in his brief that he would be amenable to retransfer of the case to the District of Columbia should we hold that Pennsylvania statute of limitations bars the action in this court. We agree that retransfer is the proper course."

10. The defendants also asserted in their motion for summary judgment that the four year statute of limitations relating to actions for breach of warranty applied to these facts and acted as a bar.

11. Judge Herman accepted this position stating that:

> "There is no conflict of laws problem to be resolved in regard to the breach of warranty, as both Pennsylvania and the District of Columbia have adopted the Uniform Commercial Code, with its four-year limitation applicable to all contracts for sale. 12A P.S. §2-725; D.C. Code §28: 2-725. This four-year period begins to run, in breach of warranty action, at the time of tender of delivery of the allegedly defective goods, and not when the injury occurs. (citations omitted) Plaintiff purchased his Volkswagen on May 23, 1968 and began this action on July 31, 1975; thus the action is clearly time-barred unless it comes within the exception as to future performance set forth in the second sentence of §2-725(2).
>
> "There is nothing in the record to indicate that any explicit warranty extending to future performance was given in connection with the sale of plaintiff's Volkswagen.
>
> The warranty upon which plaintiff seeks to recover is an implied one that the automobile manufactured by defendants would provide reasonable protection to its occupants in the event of collision. This is not within the exception §2-725(2). To apply this exception, as plaintiff urges, to an implied warranty merely because the alleged breach was not readily discoverable would completely negate the provision of §2-725(1) that the cause of action accrues 'when breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.'" (citations omitted).

12. The court by its order of January 10, 1977, granted the motion for summary judgment by Defendant Volkswagen Atlantic, Inc. and dismissed it from the action.

13. The same order denied the motions by Defendants Volkswagenwerk Artiengesellschaft, Volkswagen of America, Inc. and Cameron Auto, Inc.

14. On January 28, 1977, Defendants Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. filed a motion for reconsideration on the grounds that:

a. The grant of Volkswagen Atlantic's motion together with the denial of the remaining defendants' motions caused a distinction among defendants in the same class thereby constituting a violation of equal protection of the law.

b. No motion for transfer or petition for transfer was ever filed with the U.S. District Court for the Middle District of Pennsylvania. Rather the court, *sua sponte*, transferred the case back to the District of Columbia.

c. Failure to give the defendants notice, hold a hearing on the matter of transfer, and provide the defendants an opportunity to be heard denied the defendants due process of law within the Fifth and Fourteenth Amendments of the Constitution.

15. On January 28, 1977, the court granted the motion for reconsideration and stayed all proceedings in the District Court for the District of Columbia until disposition of this case.

16. On March 22, 1977, the court heard argument on defendants' motion to reconsider.

17. On August 15, 1977, the court entered its order denying defendants' motion for reconsideration and countermanding its stay granted on January 28, 1977.

THE MOTION TO AMEND THE COURT'S ORDER IN COMPLIANCE WITH RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

18. The grant of summary judgment in favor of the defendant, Volkswagen Atlantic, Inc., one of the four

defendants in this action, has terminated the plaintiff's claim against that party and there is no just reason for delay.

WHEREFORE, because the claim of the plaintiff against Defendant Volkswagen Atlantic has been completely adjudicated and because there is no just reason for delay, the defendants, Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc., move that the court expressly determine that there is no just reason for delay and expressly direct the entry of a final judgment in favor of Defendant Volkswagen Atlantic, Inc.

MOTION FOR THE CERTIFICATION OF THE COURT'S ORDER UNDER 28 U.S.C. §1292(b)

19. The district court granted summary judgment in favor of Volkswagen Atlantic, Inc. on the grounds that the plaintiff's cause of action was barred by the two-year Pennsylvania statute of limitations governing actions for personal injury.

20. The district court denied the motions of Defendants Volkswagenwerk Artiengesellschaft, Volkswagen of America, Inc. and Cameron Auto, Inc. applying the three-year District of Columbia statute of limitations governing actions for personal injury.

21. If the two-year Pennsylvania statute were applied to the actions against Defendants Volkswagenwerk Artiengesellschaft, Volkswagen of America, Inc. and Cameron Auto, Inc., the plaintiff's cause against those defendants would be time-barred.

22. The district court's order involves a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal from that order may materially advance the ultimate termination of the litigation.

WHEREFORE, Defendants Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. request that the court enter an order, pursuant to 28 U.S.C. §1292(b), stating that this case involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation.

MEYER, DARRAGH, BUCKLER,
BEBENEK & ECK

By .....
ANDREW J. BANYAS, III, ESQUIRE
MICHAEL V. GILBERTI, ESQUIRE
Attorneys for Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc.

Exhibit E

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR.,
Plaintiff

vs.

VOLKSWAGENWERK ARTIENGESELLSCHAFT, VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN ATLANTIC, INC., and CAMERON AUTO, INC., a Pennsylvania corporation,
Defendants

Civil Action
No. 75-1307

FILED
Harrisburg, Pa.
Jan. 3, 1978
Per /s/ DONALD R. BERRY, CLERK
Deputy Clerk

ORDER

AND NOW, this 3rd day of January, 1978, IT IS ORDERED that Defendants' motion to certify its interlocutory order of August 15, 1977 under 28 U.S.C. §1292(b) and Rule 54(b) of the Federal Rules of Civil Procedure be and it is hereby denied.

/s/ R. DIXON HERMAN
R. DIXON HERMAN
United States District Judge

Supreme Court, U. S.
FILED
MAY 25 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1537

VOLKSWAGENWERK ARTIENGESELLSCHAFT and
VOLKSWAGEN OF AMERICA, INC.,
Petitioners

v.

THE HONORABLE R. DIXON HERMAN, JUDGE
OF THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA,
SELDON P. TODD, JR., CAMERON AUTO, INC.
and VOLKSWAGEN ATLANTIC, INC.,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1537

VOLKSWAGENWERK ARTIENGESELLSCHAFT and
VOLKSWAGEN OF AMERICA, INC.,
Petitioners

v.

THE HONORABLE R. DIXON HERMAN, JUDGE
OF THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA,
SELDON P. TODD, JR., CAMERON AUTO, INC.
and VOLKSWAGEN ATLANTIC, INC.,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

TO: The Honorable the Chief Justice and
the Associate Justices of the Supreme
Court of the United States

Respondent, Seldon P. Todd, Jr., opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Opinions Below
& Jurisdiction

OPINIONS BELOW

In addition to the memoranda and orders reprinted by Petitioners, the order of Judge R. Dixon Herman dated January 28, 1977 (granting motion for reconsideration) is pertinent to the issues raised. (Respondent's Appendix (hereinafter R.A.) 1).

JURISDICTION

The jurisdiction of this Court to review the Third Circuit's order of January 27, 1978, (A.2), is problematical for two reasons. First, the file is not in the Third Circuit, but in the District Court for the District of Columbia, where it was transferred on January 13, 1977, and where it remained but for three months, from May 10, 1977, to August 17, 1977. (A. 10, 12-13) (docket entries). The file was returned to the Middle District of Pennsylvania for these three months so that Judge Herman might refer to it concerning Petitioners' motion for reconsideration, which was then pending. (A. 12) (docket entry). Second, certiorari to the Third Circuit would bring the order of January 27, 1978, here for review, but not the questions which Petitioners wish to present. See Petitioners' Brief 2. The reason is that these issues, "equal protection" and "due process," were not preserved below.

These issues were not preserved below because Petitioners waited more than ten days before applying to Judge Herman for reconsideration of his order of January 10, 1977,[1] (A. 26-31); see (A. 10) (docket entries), and failed to act promptly to stay the transfer. This is clear from a comparison of the date of entry of Judge Herman's order denying Petioners' motion for summary judgment, January 11, 1977, with the date of

1 This order was entered on January 11, 1977. (A. 10) (docket entry).

filing of Petitioners' motion for reconsideration, January 28, 1977. (A. 10, 13). Whether or not Petitioners' motion for reconsideration was timely for the purpose of obtaining reconsideration, it was not timely for the purpose of tolling the time for appeal provided by 28 U.S.C. Sec. 2107 (1970). See infra at 4-5. See generally Gainey v. Brotherhood of Railway and Steamship Clerks, etc., 303 F.2d 716 (3d Cir. 1962) (appeal within thirty days of denial of reconsideration timely because motion for reconsideration filed within ten days).

In response to this observation, which Respondent made to Judge Herman in opposition to Petitioners' motion for certification, Petitioners argued that their motion for reconsideration was timely (even though they filed nothing within ten days of the January 10, 1977 order) "because the appealable order here is that of August 15 -- and not January 10." (Emphasis in original). (R.A. 2-5)[2] Yet in this Court, Petitioners blithely assert that their motion for certification, filed on August 24, 1977, (A. 13) (docket entry), timely sought certification of the order of January 10, 1977. Petitioners' Brief 6. Now that Petitioners admit that the controlling order was entered in January (denying summary judgment) and not in August (affirming pre-

2 Only the pertinent section of Petitioners' pleading, entitled "Reply of Defendants Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc. to Plaintiff's Opposition to Certification" is included in Respondent's Appendix. Prior to this argument that the appealable order was the one of August 15, 1977, which refused to modify the original order of January 10, 1977, Petitioners argued that their motion for reconsideration was timely because it could be treated as a Rule 60(b) motion. See Fed. R. Civ. P. 60(b), 28 U.S.C. (1970). This argument suffers from the same fatal flaw as the other one: it overlooks the fact that Rule 60(b) motions do not extend the time for appeal. See 9 Moore's Federal Practice 953-54 (1975).

vious order), they also must admit that the only issue preserved below was Judge Herman's refusal to certify.[3]

This result obtains even though Petitioners sought mandamus on the merits, for three reasons. First, Petitioners failed to act promptly to stay the transfer Judge Herman ordered. Second, when Petitioners finally did act, they chose to pursue a mistaken remedy. Instead of seeking reconsideration of a transfer ordered eighteen days earlier, Petitioners should have requested a stay of the transfer in the Middle District of Pennsylvania, or filed a motion for retransfer in the District of Columbia. Starnes v. McGuire, 512 F.2d 918 (D.C. Cir. 1974); Swindell-Dressler Corp. v. Dumbauld, 308 F.2d 267 (3d Cir. 1962); Drabik v. Murphy, 246 F.2d 408 (2d Cir. 1959); Wilson v. Ohio River Co., 236 F. Supp. 96 (S.D. W. Va. 1964); see (A. 42-43 & n.4) (memorandum). The time to pursue a proper remedy is not suspended by the pursuit of a mistaken one. Darnell v. Illinois Central R. Co., 206 F. 445 (6th Cir. 1913). Third, the time for mandamus expired while the motion for reconsideration was sub judice. See 28 U.S.C. Sec. 2107 (1970). An order denying a motion to modify an original order is not appealable; rather, the appeal, if any, lies from the original order. Pfister v. Northern Illinois Finance Corp., 317 U.S. 144, 149-50 (1942). The time for appeal from the original order of January 10, 1977, entered January 11, 1977, by way of mandamus or otherwise, expired ninety days later, on April 11, 1977, unless it was suspended by Petitioners' motion for reconsideration. However, the time for appeal was not suspended by Petitioners' motion for reconsideration, because only post-judgment or order motions filed with-

---

3 On the merits of this issue, it is clear that Judge Herman's decision not to certify was well within the discretion remitted to him by the statute, 28 U.S.C. Sec. 1292(b) (1970). Moreover, a refusal to certify is not appealable. Re Master Key Antitrust Litigation, 528 F.2d 5 (2d Cir. 1975).

in ten days of the date of the judgment or order extend the time for appeal. Fed. R. Civ. P. 59(e), 28 U.S.C. (1970); 9 Moore's Federal Practice 953-54 (1975). Thus, Petitioners' time for appeal from the order of January 10, 1977 expired on April 11, 1977, but the petition for writ of mandamus was not filed until January 12, 1978. (A. 1) (docket entry). It follows that their belated petition for writ of certiorari cannot bring the merits of Judge Herman's order of January 10, 1977 to this Court for review.

QUESTIONS PRESENTED

I. Whether a motion for reconsideration of an original order denying a motion for summary judgment on the merits, filed more than ten days after entry of the order, suspends the running of the time for appeal from the original order, so as to permit an appellate court to review the original order, and thus preserve for this Court alleged errors in the original order?

II. Whether defendants which are timely sued and served in the jurisdiction in which plaintiff's cause of action arose, which has a three year statute of limitations, and in which defendants are amenable to suit, are similarly situated with a co-defendant which is not amenable to suit in that jurisdiction, such that they are denied equal protection when a transfer occurs to a jurisdiction with a two year statute of limitations, and the co-defendant which was not amenable to suit in the transferor jurisdiction is dismissed on the basis of the two year statute, but they are not dismissed because plaintiff did everything necessary to preserve his rights against them under the laws of the transferor jurisdiction, having filed within the limitation period and successfully served process upon them?

III. Whether due process is denied to defendants which are notified in a memorandum filed by plaintiff that he requests a transfer, and which oppose that request in a responsive pleading prior to entry of an

order for transfer in the interests of justice, and which are given two more opportunities in writing in addition to an oral hearing in which to seek reconsideration of the transfer order, and upon reconsideration the transfer order is affirmed?

STATUTES INVOLVED

In addition to 28 U.S.C. Sec. 1404(a) (1970), this case involves 28 U.S.C. Sec. 2107 (1970), which provides, in pertinent part:

> Sec. 2107. Time for appeal to court of appeals
>
> Except as otherwise provided in this section no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

* * *

STATEMENT OF THE CASE

This statement of the case is necessary to correct four inaccuracies or omissions in the statement of the other side.

First, Petitioners incorrectly state that they requested oral argument in conjunction with their motion for summary judgment. Petitioners' Brief 5. Review of their Appendix fails to reveal any such request.[4] Even if a request had been made, whether to

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4 Respondent also reviewed documents not of record before making this observation, including Petitioners' motions for summary judgment and accompanying letters to the Clerk of the District Court for the Middle District of Pennsylvania.

schedule argument is discretionary. M. D. Pa. R. Civ. P. 301.03 (1973).[5] Second, Petitioners continually assert that Judge Herman transferred this case back to the District of Columbia without their receiving notice or an opportunity to be heard. Petitioners' Brief 5, 6, 7, 8, 12-13, 14. However, they fail to disclose that Respondent Todd's opposition to their motions for summary judgment requested retransfer of the case to the District of Columbia as an alternative to application of the Pennsylvania statute of limitations to Petitioners, who were properly sued in the District of Columbia. See (R.A. 6). Petitioners expressly addressed this issue in a responsive pleading. (R.A. 6-7). Moreover, Respondent Todd filed a formal motion for transfer with his brief in opposition to Petitioners' motion for reconsideration. (R.A. 8). It is therefore somewhat surprising that they argue to this Court that they were denied notice and an opportunity to be heard. Clearly, they had both. See also (A. 14) (memorandum at fn. 3).

Third, Petitioners misleadingly state that Judge Herman's memorandum and order of August 15, 1977 "refused to reconsider" Petitioners' equal protection and due process arguments. Petitioners' Brief 5-6. The fact is that Judge Herman granted Petitioners' request that he reconsider his ruling of January 19, 1977, by order dated January 28, 1977. (R.A. 1); (A. 10-11) (docket

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5 M. D. Pa. R. Civ. P. 301.03 (1973) provides:

> RULE 301.03 Hearings on Pre-Trial Motions.
>
> Promptly upon the expiration of the time for filing of all briefs in support of or in opposition to pre-trial motions the judge to whom the action has been assigned may order oral argument at such time and place as he shall direct, either in open court or in chambers. The judge, in his discretion, may grant oral argument at the request of either or both parties.

entry). Petitioners filed a brief on the merits in support of their motion for reconsideration, Respondent Todd filed a memorandum in opposition, Petitioners filed a brief in reply, and Respondent Todd filed a memorandum in response to Petitioners' reply. (A. 11) (docket entries). Oral argument was had to the Court on March 22, 1977. (A. 11-12) (docket entries); (A. 47) (notice). After all this, it is patent that Judge Herman was fully apprised of Petitioners' position on these issues prior to ruling on August 15, 1977. After being fully apprised, Judge Herman reaffirmed his prior decision on both issues. (A. 41-46) (memorandum). The merits of that decision are discussed later, infra at 9-11, although even if a writ of certiorari were granted, the merits of Judge Herman's order of January 10, 1977, would not come before this Court. See supra at 2-4.

Fourth, after reconsideration, Judge Herman issued his memorandum of August 15, 1977, in which he explained his previous decision in terms of alternative holdings: (1) jurisdiction of the case was lost when the file was forwarded to the District of Columbia without timely objection by Petitioners (A. 42-43) (memorandum), supra at 2; and (2) if jurisdiction to review the previous order existed, that order would be reaffirmed. (A. 43-46). Judge Herman's alternative holding of reaffirmation extended to both Petitioners' equal protection and due process arguments. (A. 43-45) (equal protection); (A. 45-46) (due process).

REASONS FOR NOT ALLOWING THE WRIT

In addition to the jurisdictional and procedural reasons outlined above, there are three other reasons not to allow the writ. First, the decision in this case does not conflict with the decisions of other federal courts which have considered the issue. Second, Petitioners' equal protection argument is frivolous. Third, Petitioners' due process argument seeks review of a nondispositive exercise of discretion, and is equally frivolous.

Petitioners claim a conflict between Judge Herman's decision in this case and the decisions in Carson v. U-Haul, 434 F.2d 916 (6th Cir. 1970) (Carson) and Brown v. Merrow Machine Co., 411 F.Supp. 1162 (D. Conn. 1976) (Brown). Petitioners make out this conflict the only way they can: by ignoring the crucial distinction between the facts of this case and the facts of Carson and Brown. The distinction is that in this case, Petitioners were properly and timely served in the District of Columbia. Only Respondent Volkswagen Atlantic, Inc. was held not amenable to suit in the District of Columbia, and, therefore, after transfer to the Middle District of Pennsylvania, only Respondent Volkswagen Atlantic, Inc. was held entitled to summary judgment on the basis of the Pennsylvania statute of limitations. (A. 29-31) (memorandum of January 10, 1977); (A. 43-46) (memorandum of August 15, 1977). This result is consistent with Carson and Brown, in which the transferee fora applied their shorter statutes of limitations to defendants not served or not subject to suit in the transferor fora. Petitioners in this case were served, and were subject to suit in the transferor forum, the District of Columbia. Indeed, in reaching his decision, Judge Herman expressly followed Carson: "The policy stated by the Supreme Court in Van Dusen [v. Barrack, 376 U.S. 612 (1964)]supra, dictates a result in this case similar to that of the Carson decision, supra." (A. 30) (memorandum). In sum, there is no conflict.

The second reason for not allowing the writ is that, on the merits, Petitioners' equal protection argument is frivolous. This is true for the same reason that there is no conflict between Judge Herman's decision and the decisions of other federal courts: Petitioners and Respondent Volkswagen Atlantic, Inc. are not similarly situated. Again quoting Judge Herman, "we find a very real distinction between the position of Volkswagen Atlantic and that of the other defendants which justifies the different treatment of the motions for summary judgment." (A. 44); see (A. 30-31). This

distinction, again, is that Volkswagen Atlantic, Inc. was held not amenable to suit in the District of Columbia, (A. 16) (docket entry), but the Petitioners were subject to suit in the District of Columbia. Petitioners' argument on the merits does not even acknowledge this fundamental difference between their position and that of Respondent Volkswagen Atlantic, Inc., much less confront it.

The third reason for not allowing the writ is that Petitioners' due process argument seeks review of a nondispositive exercise of discretion. Judge Herman's decision to retransfer this case to the District of Columbia is nondispositive because it relates only to where this case is tried, not whether it is tried. In his original order of January 10, 1977, Judge Herman stated, "[n] either Van Dusen nor Carson, however, compels dismissal of the case as to the three remaining defendants." (A. 30). And in his subsequent order of August 15, 1977, Judge Herman reemphasized:

> Our retransfer of the case was not, as defendants suggest, an alternative to dismissal. Had we not retransferred the case, the only fair course would have been to permit the case to go to trial here under the law of the District of Columbia. Given this choice, retransfer to the District of Columbia seemed to be much the more desirable course, as that is the jurisdiction in which the cause of action arose, in which plaintiff originally elected to bring suit, and in which the court's grasp of the applicable law is certainly superior to ours.

(A. 45-46). In apparent recognition of the nondispositive nature of their due process argument, Petitioners allege that it

> becomes significant in light of the choice of law argument. If the transfer is void ab initio, then the proper forum is Pennsylvania and, before the district court may reach the motion to transfer, it must determine the choice of law problem.

Petitioners' Brief 13. The futility of certiorari directed to Petitioners' due process argument is demonstrated by this excerpt from their brief. This is because the district court, per Judge Herman, already has determined the choice of law (equal protection) problem adverse to Petitioners (A. 28-31) (memorandum of January 10, 1977); and upon reconsideration, has reaffirmed that decision. (A. 43-46) (memorandum of August 15, 1977). Clearly, returning this issue to Judge Herman, because of alleged procedural irregularities in reaching it, would serve no purpose.

Moreover, the procedural irregularties which are alleged are more chimerical than real. Petitioners had notice and an opportunity to be heard before the transfer order was entered, supra at 6-8. Even if the notice and opportunity to be heard was inadequate prior to the transfer order, it was patently adequate thereafter. Had Judge Herman regretted his decision upon reconsideration, and expressed a desire but inability to reverse it because of a loss of jurisdiction, Petitioners' case might have merit. But that is not the case. In the portion of his decision on reconsideration quoted above, Judge Herman made his opinion perfectly clear that retransfer to the District of Columbia was "much the more desirable course." Supra at 10. He expressed this reaffirmation of this previous decision in a matter in which he has broad discretion, Norwood v. Kirkpatrick, 349 U.S. 29 (1955) in which he cited and weighed the pertinent considerations, see Van Dusen v. Barrack, 376 U.S. 612 (1964), after each side submitted two briefs on the issue and oral argument was had. Supra at 6-7. In light of it, Petitioners' due process argument is as frivolous as their equal protection claim.

CONCLUSION

Jurisdictional and procedural obstacles to full review make this an inappropriate case in which to issue

a writ of certiorari. Even if these obstacles were surmountable, the decision below (1) is not in conflict with the decisions of other federal courts; (2) does not raise a substantial equal protection argument because the parties who were treated differently were not similarly situated; and (3) does not present an important issue of due process because the court below made and then reaffirmed a well-reasoned decision to retransfer, in a matter remitted to sound discretion, and which considered the pertinent factors, after notice and an opportunity to be heard.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR., Plaintiff	:	
v.	:	Civil Action No. 75-1307
VOLKSWAGENWERK ARTIENGESELLSCHAFT, VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN ATLANTIC, INC., and CAMERON AUTO, INC.	:	FILED Harrisburg, Pa. January 28, 1977 /s/ Donald R. Berry Clerk Per Deputy Clerk
Defendants	:	

ORDER

AND NOW to wit, this 28th day of January, 1977, it is hereby ordered that the within Motion for Reconsideration of the Defendants' Motions for Summary Judgment is hereby granted. It is further ordered that all proceedings in the United States District Court for the District of Columbia shall be stayed until further order of the Court.

BY THE COURT:

/s/ R. DIXON HERMAN
R. Dixon Herman, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR., Plaintiff	:	
versus	:	
VOLKSWAGENWERK ARTIENGESELLSCHAFT, VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN ATLANTIC, INC. and CAMERON AUTO, INC. Defendants	:	Civil Action No. 75-1308

REPLY OF DEFENDANTS
VOLKSWAGENWERK ARTIENGESELLSCHAFT AND
VOLKSWAGEN OF AMERICA, INC. TO
PLAINTIFF'S OPPOSITION TO CERTIFICATION

Contrary to plaintiff's contention, the critical order is that of August 15, 1977, ultimately refusing to reconsider the court's initial decision. If any appeal is to lie, it springs from that order.

* * *

B. Defendants' Motion is Timely

The defendants' motion for reconsideration of the January 10, 1977 order sought review of all substantive issues on which the trial judge based that order. The request was not merely that the court procedurally amend or alter the order itself -- as the plaintiffs argue falls within Rule 59(e) of the Federal Rules of Civil Procedure -- but rather that the judge review the substantive claims and relieve the defendants from its operation pursuant to Rule 60(b)[1].

1. Rule 60(b) provides:

Not unlike our facts are those of Torockio v. Chamberlain Mfg. Co., 328 F. Supp. 578 (W.D. Pa. 1971), remanded, 456 F.2d 1087 (3d Cir.), reconsidered,

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertance, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.
>
> "The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken." (emphasis supplied)

56 F.R.D. 82 (W.D. Pa. 1972), affirmed, 474 F.2d 1340 (3d Cir. 1973). By an order dated June 8, 1971, the district court dismissed a sex discrimination complaint on the ground that plaintiffs had not filed their action within thirty days after the right-to-sue notice. They filed a notice of appeal on June 28, 1971, and on June 30, 1971, petitioned the district court for "Reconsideration and Review and Reinstatement of Complaint." On July 7, 1971, the district judge denied the reconsideration, not on the ground that it was untimely,[2] but on the ground that the dismissal was without prejudice and there was no necessity to reinstate the complaint. On July 26, 1971, the plaintiffs attempted to file an amended complaint. Thereafter, the court of appeals examined the unusual procedural posture; noted its uncertainty as to the character of the reconsideration petition; and remanded the case for a determination of whether, within those circumstances, the district court on July 28, 1971 would have considered favorably an application for an extension of the time in which to file a notice of appeal. 456 F.2d at 1086. The Circuit summarized its position:

> "We hold, therefore, that if, as here, a notice of appeal is filed more than 30 but less than 60 days after the entry of the judgment appealed from the district court may at any time consider a motion to validate the filing within the second 30 days for excusable neglect ... where the entry of judgment the district court may, of course, take into account the expiration of time between the entry of judgment and the making of the motion determining whether possible prejudice of the appellee from such delay would justify its denial." 456 F.2d at 1087.

---

2 As we discuss later, this decision was more completely explained by the district judge on remand. 56 F.R.D. at 85-86.

Additionally, because of the remand, it suggested that the district court examine its order of July 7, 1971 and its decision not to permit the filing of an amended complaint.

On remand, the district court examined the hiatus between the June 8 order and the June 30 petition for reconsideration as a motion under either Rule 60(b)(1) or 60(b)(6), because the plaintiffs sought relief from a final judgment, and concluded that it was timely. 56 F.R.D. at 85-86. The Court of Appeals affirmed this decision. 474 F.2d at 1340.

It is significant that in Torockio the petition for reconsideration was filed twenty-two days after the initial order disposing of the case and that the court had no difficulty with the reasonableness of that time.

In this case, the defendants desire a full reconsideration and reversal of the January 10 order and took action on January 28 -- well within reason. As a result, the court should not view this as an attempt to, by a ministerial act, alter or amend the judgment. Further, there is no doubt that, within this context, defendants' motion is timely. Finally, the appealable order here is that of August 15 -- and not January 10. In this respect, the application for certification was timely, and these motions have appropriately tolled the appeal period.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR., :
Plaintiff
:
versus : CIVIL ACTION
:
VOLKSWAGENWERK : 75-1308
ARTIENGESELLSCHAFT, :
VOLKSWAGEN OF AMER-
ICA, INC., VOLKSWAGEN :
ATLANTIC, INC. and
CAMERON AUTO, INC., :
a Pennsylvania Corporation,
Defendants :

BRIEF IN RESPONSE TO PLAINTIFF'S
BRIEF IN OPPOSITION TO DEFENDANTS'
VOLKSWAGENWERK ARTIENGESELLSCHAFT
AND VOLKSWAGEN OF AMERICA INC.
MOTION FOR SUMMARY JUDGMENT

* * *

Plaintiff argues in the alternative that:

"If it is found that the maintenance of this suit in Pennsylvania dictates that the statute of limitations of the forum state must apply, the court should transfer the case back to the District of Columbia. Plaintiff would be amenable to such transfer and will accordingly take a voluntary dismissal, pursuant to F.R. Civ. Pro. 41(a) against the Defendant Volkswagen Atlantic, Inc. over which jurisdiction was adjudged to be lacking in the District of Columbia."

It has been clearly set forth in Mata v. Budd Co., 44 F.R.D. 225 (1968) that once the motion for summary judgment has been granted, it having been filed prior to

any motion for transfer of the case to another forum, there is no longer any action pending in the court which could be made subject of transfer. There the United States District Court for the Eastern District of Pennsylvania stated that:

> "Moreover, having decided that the Pennsylvania two year statute of limitations would bar this action, it would appear 'that the transfer should be denied on the ground that the prior motion on the statute of limitations governs and no abuse of discretion would result from the consequent denial of the Sec. 1404(a) motion. Lyden v. Excello Corp., supra, at 397. See also, Quinn v. Simonds Abrasive Co., 199 F.2d 416 (3rd cir. 1952). Once the motion for judgment on the pleadings is granted, it having been filed prior to the motion for transfer, there is no longer any action pending in this court which may be made the subject of transfer."

If the defendants' Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc., motion for summary judgment is granted by this court, then there will no longer be any action pending before this court which may be made the subject of transfer.

CONCLUSION

The defendants', Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc., motion for summary judgment should be granted and the plaintiff's proposed alternative motion for transfer to the District Court for the District of Columbia should be denied.

* * *

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SELDON P. TODD, JR. Plaintiff	:	
vs.	:	Civil No. 75-1307
VOLKSWAGEN ARTIEN-GESELLSCHAFT, VOLKSWAGEN OF AMER-ICA, INC., VOLKSWAGEN ATLANTIC, INC., and CAMERON AUTO, INC., a Pennsylvania Corporation	:	
Defendants	:	

MOTION TO TRANSFER

Comes now the Plaintiff, Seldon P. Todd, Jr., by and through his attorney, Jules FInk of the firm of Katz and Fink, and files the within Motion to Transfer the above-captioned cause from the District Court for the Middle District of Pennsylvania to the District Court for the District of Columbia and as grounds therefor states:

1. 28 U.S.C. 1404(a) provides that the District Courts may transfer any civil action to any other District Court where it might have been brought if the interests of justice would be served thereby.

2. In his Order of January 10, 1977, denying Motions for Summary Judgment on behalf of Defendants, Volkswagenwerk Artiengesellschaft and Volkswagen of America, Inc., and granting same on behalf of Volkswagen Atlantic, Inc., Judge R. Dixon Herman indicated that the interests of justice would best be served by retransferring this case to the District Court of the District of Columbia since Plaintiff has

done everything necessary to preserve his rights against the remaining Defendants under the laws of the District of Columbia.

WHEREFORE, this Honorable Court is respectfully requested to retransfer this cause back to the District of Columbia.

Respectfully submitted,

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